90-370

(1)

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1990

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STANLEY A. BEILEY*
DAVID S. GARBETT
LISA A. LANDY

*Counsel of Record
Paul, Landy, Beiley & Harper, P.A.
Penthouse, Atico Financial Center
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 3(c) of the Federal Rules of Appellate Procedure, a supersedeas bond filed with a stipulation in which Appellant stated it was not then appealing constitutes a notice of appeal or its functional equivalent?

2. Whether a bank which issues a commercial letter of credit to finance the purchase of goods acts unreasonably, as a matter of law, in relying upon the documents of title and the underlying goods as collateral in the transaction?

3. Whether a standard bankers blanket bond — which provides coverage for loss resulting directly from the bank's having in good faith acquired, or given value, extended credit, or assumed liability, on the faith of, or otherwise acted upon, any original forged bill of lading — insures a bank against a loss sustained from honoring a letter of credit after presentation of original forged bills of lading held by the bank as collateral?

PARTIES TO THE PROCEEDING

Petitioner: Republic National Bank of Miami, a national banking association.*

Respondent: Fidelity and Deposit Company of Maryland, a Maryland corporation.**

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* Pursuant to Sup. Ct. R. 29.1, Republic is a wholly owned subsidiary of Republic Banking Corporation of Florida, a Florida corporation. There are no non-wholly owned subsidiaries of Republic.

** Republic is not aware of any parent or non-wholly owned subsidiaries of Fidelity and Deposit Company of Maryland.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Republic National Bank of Miami ("Republic") hereby petitions for a writ of certiorari and requests that this Court grant the petition, vacate the judgment of the court of appeals and reinstate the judgment entered by the district court in favor of Republic and against Fidelity and Deposit Company of Maryland ("F&D").

REFERENCE TO OPINION BELOW

The opinion of the court of appeals is reported as Republic National Bank of Miami, a national banking association, Plaintiff-Appellee, v. Fidelity and Deposit Company of Maryland, a Maryland Corporation, Defendant-Appellant, consolidated Case Nos. 87-6034 and 88-5185, 894 F.2d 1255 (11th Cir. 1990), and is reproduced in the Appendix to this Petition at pages A-1-21. The order of the court of appeals

> the letter of credit. The presentation of the forged bills of lading triggered Republic's decision to pay $1,239,000.00. Thus, Republic gave value "on the faith of" the forged bills. Republic's loss continued to be caused by the forged bills of lading because when Republic resorted to the bills to locate the 6,000 bags of Colombian coffee held as collateral, no coffee existed. Republic's loss therefore comes within Insuring Agreement (E) of the bond. *See American Ins. Co. v. First Nat'l Bank in St. Louis*, 409 F.2d 1387 (8th Cir. 1969).

A-37-38 (brackets added).

On September 29, 1987, the district court entered final judgment. A-40-41. Because the judgment recited post-judgment interest at an incorrect rate, F&D filed a motion, purportedly under Fed.R.Civ.P. 59(e), to alter or amend the judgment by deleting the reference to post-judgment interest. A-58-60. On October 13, 1987, F&D filed a supersedeas bond and a stipulation in which F&D stated that because the post-judgment motion was pending, F&D was not then appealing. A-61-63; 64-65.

On October 16, 1987, the district court entered an order granting F&D's motion by deleting the sentence concerning post-judgment interest. A-42-43. On October 28, 1987, the court also entered an amended final judgment which deleted the reference to post-judgment interest. A-44-45. On November 19, 1987, F&D filed its first notice of appeal. A-66-67. Thereafter, the district court, following a hearing, entered an order awarding attorney's fees to Republic. Republic moved for partial reconsideration, which was denied on February 8, 1988. F&D filed a second notice of appeal on February 26, 1988. A-68-69.

Republic moved to dismiss the appeal on the grounds that both notices of appeal were untimely. The Eleventh Circuit ruled that F&D's post-judgment motion was not an authorized Rule 59(e) motion, did not toll the time for appeal, and therefore the first notice of appeal was untimely. However, the court treated the supersedeas bond as the

equivalent of a notice of appeal and denied Republic's motion to dismiss the appeal, impliedly rejecting Republic's argument that the supersedeas bond was not equal to a notice of appeal because when F&D filed the bond, it indicated by stipulation that it did not intend to effect an appeal at that time. A-22-23.

In a sharply divided decision on the merits, the Eleventh Circuit reversed 2-1. Judge Tjoflat, writing for the majority, held that no bank can, as a matter of law, reasonably rely on documents of title as collateral to finance its customer's purchase of goods under a commercial letter of credit. The majority asserted that a letter of credit transaction is so inherently untrustworthy that no party — buyer, seller or bank — can reasonably expect nor require good faith performance from the other, and therefore "the bank . . . has no guarantee that these documents [of title] will be genuine, nor is it entitled to one." A-15 (brackets added). Thus, according to the majority, when a bank relies on documents of title, the bank acts unreasonably as a matter of law as such reliance "is no more than a bet on the roll of the dice."[1] A-15.

The majority also concluded that the bankers blanket bond did not cover the bank's loss. The court focused on a provision in the bond requiring the bank to have possession of original documents of title as a condition precedent to relying or acting on the documents and concluded that the bank must have possession of the forged collateral document when it makes the credit decision. Possession of the forged document prior to advancing the funds was irrelevant to the court. Since a bank issuing a letter of credit payable only on presentation of bills of lading can never have the bills before issuance of the letter of credit, the majority concluded that the bond does not insure a letter of credit/bill of lading loss. A-14.

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[1] As discussed *infra*, as of September 1989 there were in excess of 31 billion dollars in outstanding commercial letters of credit financed by commercial banks in the United States where such reliance occurs.

In a vigorous dissent, Senior Circuit Judge John R. Brown characterized the decision as startling. He observed that the majority's declaration — that in a letter of credit transaction the bank has no guarantee that the bills of lading are genuine, nor is the bank entitled to one — is contrary to fundamental principles of commerce, where parties depend upon each other's good faith. A-17-19.

Judge Brown also noted that the majority misread the bond to require the bank to have possession of the forged documents of title when it issues the letter of credit. Judge Brown, agreeing with the trial court, concluded that because the bank had possession of the original forged bills of lading *before* it honored the letter of credit, and the receipt of the bills of lading triggered payment under the letter of credit, Clause (E) of the bond covered the loss. A-19-21.

REASONS FOR GRANTING THE WRIT

This Petition raises three issues. The first involves an issue of appellate jurisdiction. The other two involve commercial issues that significantly impact commerce.

This Court has never addressed the important jurisdictional issue presented: what criteria should determine whether a collateral document constitutes a notice of appeal or its functional equivalent? Decisions of the circuit courts directly conflict on this issue. This case presents the Court the opportunity to resolve the conflicts among the circuits and announce guiding principles.

The adverse impact on commerce created by the decision below is so far-reaching as to warrant this Court's review of the commercial issue presented: whether banks act unreasonably, as a matter of law, in relying on documents of title as collateral to finance the purchase of goods under commercial letters of credit. The decision departs from centuries of accepted banking practice in holding that documents of title are unworthy of reliance in financing trade. The decision contravenes important federal statutes and the Uniform Commercial Code as adopted by every state, and conflicts

with decisions of this Court and other circuit courts, all of which recognize the reasonableness of and encourage such bank reliance.

This Petition also raises a third issue inextricably tied to the second question: whether the standard bankers blanket bond insures a bank against a loss sustained from honoring a letter of credit when presented with documents of title which turn out to be forged. Because secured letter of credit financing is indispensable to domestic and international commerce, and because banks must rely on the facial validity of the documents of title, banks must be able to insure against the risk of forgery. Clause (E) of the bankers blanket bond — a standard provision throughout the industry — explicitly provides such protection. The circuit court's contrary interpretation and reasoning is antithetical to standard banking practice and expectations. This Court should therefore grant certiorari on these important questions to preserve the ability and willingness of banks to provide secured letter of credit financing.

I. THE CIRCUITS ARE IN CONFLICT IN DECIDING WHAT TYPES OF DOCUMENTS CONSTITUTE THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL

A. F&D's Notices of Appeal Were Untimely

The Eleventh Circuit correctly determined that F&D's two notices of appeal were untimely. However, the court erred in treating the supersedeas bond as a notice of appeal because F&D's stipulation, filed with the bond, clearly stated that F&D was not then appealing the final judgment. The stipulation clearly expressed F&D's intention to appeal at some future date. Therefore, the bond was not a notice of appeal or its functional equivalent, and the appellate court had no jurisdiction to decide the appeal.[2]

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[2] Because F&D's motion to delete a sentence concerning post-judgment interest from the final judgment did not seek "reconsideration of matters properly encompassed in a decision on the

B. Compliance with Rules 3(c) and 4(a)(1) is Mandatory and Jurisdictional

Fed.R.App.P. 3 and 4 require that a party file a sufficient notice of appeal within 30 days after the date of entry of judgment. Compliance with these rules is both mandatory and jurisdictional. The appellate court may not waive compliance with these requirements. If a party fails timely to file a proper notice of appeal, the appellate court lacks jurisdiction and must dismiss the appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *United States v. Robinson*, 361 U.S. 220 (1960).

Fed.R.App.P. 3(c) provides:

> **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

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merits," *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982), *Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988), the motion did not toll the time for appeal. F&D's first notice of appeal, filed over 50 days after entry of the judgment, was therefore untimely. Moreover, even if F&D's post-judgment motion were a Rule 59(e) motion, its notice of appeal was due within 30 days of entry of the order granting the motion, Fed.R.App. P. 4(a)(4), *i.e.*, by November 15, 1987. F&D's notice of appeal filed November 19, 1987 was similarly untimely. Nor was the time to appeal to be measured from the amended final judgment, which changed nothing of substance in the final judgment and did not affect any issues on appeal. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952).

F&D's second notice of appeal, filed February 26, 1988, appealing the order awarding attorney's fees, was not effective nor timely to appeal the final judgment entered September 29, 1987. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988) (district court's retention of jurisdiction to award attorney's fees does not affect finality of judgment for purposes of appeal).

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), this Court held that the failure to file a notice of appeal in accordance with the specificity requirements of Rule 3(c) constitutes a jurisdictional bar to the appeal. In concluding that a notice of appeal which omitted a party's name did not comply with Rule 3(c), this Court recognized that a party may file a document which "is the functional equivalent of what the rule requires." 487 U.S. at 317, citing *Houston v. Lack*, 487 U.S. 266 (1988). However, this Court in *Torres* concluded that the petitioner had not filed the functional equivalent of a notice of appeal, as the term "et al." failed to give notice with *certainty* that the unnamed petitioner was appealing. 487 U.S. at 317-18.

The Court in *Torres* did not delineate the criteria for determining in a particular case whether a document qualifies as a notice of appeal. However, this Court has consistently emphasized the need for and has adopted bright-line rules producing certainty, consistency and predictability in determining appellate jurisdiction. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 267 (1978); *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202-203 (1988); *Houston v. Lack*, 487 U.S. 266, 275 (1988); *Osterneck v. Ernst & Whinney*, 489 U.S. 169, __ n.3, 109 S. Ct. 987, 992 n.3 (1989).

In *Houston*, this Court stressed the need for certainty in determining appellate jurisdiction. 487 U.S. at 275. Even the dissenting opinion, joined by four justices, agreed that uniformity and certainty in interpreting the appellate rules on jurisdiction was necessary:

> If the need for a uniform meaning is apparent even with respect to ordinary statutory deadlines, and indeed even with respect to court-created rules that can be amended at the judges' discretion, it is even more apparent when a statutory deadline bearing upon the very jurisdiction of the courts is at issue. *In that context, allowing courts to give different meanings from case to case allows them to expand and contract the scope of their own competence. That this is not envisioned is plain (if any*

citation is needed) from Rule 26(b) of the Federal Rules of Appellate Procedure . . . .

487 U.S. at 279 (emphasis added).

C. The Circuits Conflict on what Constitutes the Functional Equivalent of a Notice of Appeal

According to Professor Moore, "since a notice of appeal may be the simplest instrument known to federal procedure, and the directions for filing are abundantly clear, the rule does not appear calculated to produce much confusion." 9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice and Procedure* ¶ 203.09 at 3-37 (2d ed. 1990). However, as discussed below, there is considerable conflict and confusion among the circuit courts on what constitutes the functional equivalent of a Rule 3(c) notice.

Some courts require that a party intend that the collateral document signify the start of an appeal, while the Eleventh Circuit does not require such intent. Some courts hold that a collateral document which by its terms is inconsistent or ambiguous concerning the intent to appeal is not a valid substitute for a Rule 3(c) notice, while other courts permit such documents to qualify. Some courts hold that a document which contains the recitals of Rule 3(c) but does not purport to be a notice of appeal is not a sufficient Rule 3(c) notice, while others hold that such a document is acceptable. These disparate approaches have lead to totally irreconcilable results. The absence of guiding principles has allowed the circuits "to give different meanings from case to case . . . [and] to expand and contract the scope of their own competence," *Houston, supra*, 487 U.S. at 279 (Scalia, J., dissenting) (brackets added), contrary to the appellate rules of procedure.

In this case, F&D filed a stipulation, with its supersedeas bond, seeking a stay of execution and approval of the bond. The stipulation provided that since F&D's motion to alter the judgment was pending, the court should grant "a stay pending any ensuing appeal" as F&D "cannot now appeal." A-62.

The stipulation further provided that the bond would protect Republic "until the appeal, which F&D intends to file in this matter, is either dismissed or affirmed." A-62. The stipulation makes it clear that when F&D filed the bond, F&D was not then appealing. Despite F&D's expressed intent that it was not then appealing, the Eleventh Circuit treated the bond as a notice of appeal.

The Eleventh Circuit's ruling conflicts with *Cel-A-Pak v. California Agric. Labor Relations Bd.*, 680 F.2d 664 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982). There, the notice of appeal was untimely. However, during the time to appeal, the appellant filed a motion for injunction pending appeal and for rehearing to alter the judgment. Appellant conceded that when he filed the document, he did not intend to appeal nor intend the document be treated as a notice of appeal. Based on this intent, the Ninth Circuit refused to treat the document as a notice of appeal:

> The document filed by appellant and counsel's statements regarding it evince a desire to have the district court retain jurisdiction and alter its judgment rather than a desire to effectively take an appeal and thus terminate the district court's jurisdiction.

680 F.2d at 668.

The Eleventh Circuit's rationale also conflicts with the Tenth Circuit's decisions in *Martinez v. Sullivan*, 874 F.2d 751 (10th Cir. 1989), and *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir.), *cert. dismissed*, 444 U.S. 987 (1979). In both cases, appellants filed premature notices of appeal. Within the time to appeal, however, appellants filed collateral documents (in *Martinez*, a letter, in *Montgomery*, a motion to stay injunction pending appeal). The Tenth Circuit refused to treat these documents as notices of appeal because the appellants believed, though mistakenly, that they had

already appealed and did not intend the collateral documents to serve as notices of appeal.[3]

F&D filed a supersedeas bond and a stipulation renouncing the bond as a notice of appeal. In deciding whether similar documents can be the functional equivalent of a notice of appeal, the circuit courts are in conflict. *Washington v. Patlis*, 868 F.2d 172 (5th Cir. 1989) (*pro se* motion to reconsider or alternatively notice of intent to appeal does not constitute functional equivalent of notice of appeal); *United States v. Cooper*, 876 F.2d 1192 (5th Cir. 1989) (*pro se* motion for rehearing and notice of appeal does not constitute functional equivalent of notice of appeal); *contra Bradley v. Coughlin*, 671 F.2d 686 (2d Cir. 1982) (*pro se* motion to reconsider or alternatively for leave to appeal constitutes the functional equivalent of a notice of appeal).

The circuits are also in conflict on the issue whether a notice of appeal may be satisfied by a document which, although it contains the recitals of Rule 3(c), does not purport to be a notice of appeal. *Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965) (appellate brief constitutes notice of appeal); *contra United States v. Cooper*, 876 F.2d 1192 (5th Cir. 1989) (appellate brief will not constitute a notice of appeal even if it meets the requirements of Rules 3 and 4; to construe the brief as a notice of appeal would eliminate entirely the requirement under Rule 3 for the filing of a notice of appeal).[4]

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[3] The Eleventh Circuit's order treating the supersedeas bond as a notice of appeal cites *Stallworth v. Shuler*, 758 F.2d 1409 (11th Cir. 1985), which in turn relies upon *O'Neal v. United States*, 272 F.2d 412 (5th Cir. 1959), a decision this Court has characterized as "a liberal view of papers filed by indigent and incarcerated defendants. . . ." *Coppedge v. United States*, 369 U.S. 438 at 442 n.5 (1962).

[4] *See also* and *compare Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989) (motion for stay pending appeal does *not* constitute notice of appeal because lenient standard does not apply to a party represented by counsel) *with Dura Systems, Inc. v. Rothbury Inv., Ltd.*, 886 F.2d 551 (3d Cir. 1989), *cert. denied*, 110

There are circuit court decisions which actually turn on the arrangement of the words in the collateral document in determining whether the document "clearly evinces" an intent to appeal. *Compare Mosley v. Cozby*, 813 F.2d 659 (5th Cir. 1987) (motion to reconsider judgment or alternatively for leave to appeal *in forma pauperis* did *not* clearly evince intent to appeal) *with Buffalo v. Sunn*, 854 F.2d 1158 (9th Cir. 1988) (state's notice of appeal providing that the state hereby appeals *unless* district court reconsiders its order clearly evinced the state's intent to appeal). The *Buffalo* court, recognizing the apparent conflict with *Mosley*, offered the following "distinction":

> Whereas an appeal was sought in *Mosley only in* the event that reconsideration by the district court was denied, an appeal was intended in this case *unless* reconsideration was granted.

Id. at 1161 (emphasis in original). Such artificial "distinctions," seizing upon the fortuitous sentence structure of the document, should have no place in determining appellate jurisdiction.

This Court has recognized that the "filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 at 58 (1982). The function of a notice of appeal is to notify the court and opposing party that appellant is taking an appeal *at the time of filing the notice*, not that a party may appeal sometime in the future. The very words required by Rule 3(c) speak in the present tense: "The notice of appeal shall specify the party . . . *taking the appeal;* shall designate the judgment . . . *appealed from*; and shall name the court to which the appeal *is taken.*" (emphasis added). The suggested

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S.Ct. 844 (1990) (order granting stay of judgment constitutes functional equivalent of notice of appeal).

form does as well: "Notice is hereby given that [appellant] hereby appeals. . . ."[5]

Although Rule 3(c) forgives "informality of form or title of the notice of appeal," the rule still requires appellant to file a document by which appellant intends to effect an appeal. F&D did not timely file any such document. "Informality of form or title" is not a license to an appellate court to treat a document, contrary to appellant's own statement that it was not then appealing, as a notice of appeal.

If under *Torres* a party must specify clearly *who* is appealing, that party should also be required to specify clearly *when* it is appealing. To comply with Rule 3(c), a party should unequivocally intend to appeal when it files the collateral document and should intend the document to mark the beginning of an appeal. A collateral document renounced by appellant in an accompanying stipulation as a notice of appeal is the exact opposite of the function and objective of a valid notice of appeal. This Court should therefore grant certiorari to resolve the conflicts among the circuits on this important jurisdictional issue.

II. BANKS HAVE THE RIGHT TO RELY ON DOCUMENTS OF TITLE TO FINANCE THE PURCHASE OF GOODS UNDER A COMMERCIAL LETTER OF CREDIT

The circuit court's majority decision that no bank may, as a matter of law, reasonably rely on documents of title to finance the purchase of goods under a commercial letter of credit conflicts with important federal legislation and clashes with long standing legal principles enunciated by this Court and other circuit courts. In holding that secured letter of credit financing is unsound, the decision below threatens a

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[5] This Court in *Griggs* impliedly rejected the argument that various collateral documents filed in that case constituted a sufficient notice of appeal. *See Griggs*, 459 U.S. 56 at 62-66 (Marshall, J., dissenting).

source of bank financing which, as of September 1989, exceeded $31 billion in the United States.[6]

Secured Letter of Credit Financing

The paramount function of a commercial letter of credit is to finance the sale of goods. In such transactions, it is standard practice for the issuing bank to rely on the documents of title as well as the underlying goods as collateral.[7] In a typical secured letter of credit financing transaction, the issuing bank agrees with its customer (the buyer of the goods) to advance funds to the beneficiary (the seller) by honoring the letter of credit. The bank's payment to the seller under the letter of credit creates a loan to the customer-buyer. As collateral for this loan, the customer pledges to the bank the original documents of title presented by the seller-beneficiary. Because the documents of title are negotiable instruments that control the goods, the bank is secured by possession of the documents. If the customer defaults on the loan, the bank may claim the goods and sell them to satisfy the debt. Secured letter of credit financing thus provides buyers with purchase money to conduct trade while at the same time protects banks which are secured by the pledged documents of title and the goods. *See Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386 at 394 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); H. Harfield, *Bank Credits and Acceptances* 27, 59-74 (4th ed. 1958); B. McCullough, *Letters of Credit* § 3.10[3] at 3-99 (1990); 7 R. Anderson, *Uniform Commercial Code* § 5-114:23 at 342 (3d ed. 1985).

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[6] According to the Federal Reserve Bank in Atlanta, the $31 billion amount excludes letters of credit purchased by the bank's customers by paying cash or its equivalent to the issuing bank at the time it issues the letter of credit.

[7] B. McCullough, *Letters of Credit* § 3.10[3] at 3-99 (1990): "In the letter of credit transaction, the documents of title presented by the beneficiary to the issuer, and the goods covered by the documents of title, most often constitute the collateral for the account party's obligation to reimburse the issuer." *Id.* (footnotes omitted).

Henry Harfield, the dean of letter of credit law and practice, describes the financing function of a commercial letter of credit as follows:

> The commercial letter of credit also has certain advantages for the buyer. It may afford him a means of using his purchase as security for obtaining credit necessary to finance the transaction. A documentary commercial letter of credit is automatically self-securing because the [issuing] bank's credit or funds are placed at the disposal of the beneficiary in exchange for negotiable shipping documents that convey control of the merchandise. For this reason the [issuing] bank may be willing to issue such a letter of credit for a buyer to whom it would not willingly make a loan for an equivalent amount without security.

H. Harfield, *Bank Credits and Acceptances* 27 (4th ed. 1958) (brackets added). Another noted letter of credit commentator, Professor Boris Kozolchyk, similarly observes:

> Although bankers' security extends to a number of documents, ... the bill of lading will be singled out as the main subject for analysis. This is because the bill of lading is a pivotal instrument for bankers' security in documentary credits . . . .

B. Kozolchyk, *Commercial Letters of Credit in the Americas* § 4.04[2] (1966).[8]

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[8] A commercial letter of credit finances the sale-of-goods transaction and guaranties payment. It is to be distinguished from standby letters of credit, which do not usually involve the sale of goods and guaranty performance by the account party. *See* Verkuil, *Bank Solvency and Guaranty Letters of Credit*, 25 Stan.L.Rev. 716, 721 (1973). Commercial letters of credit are considered secured lending; standbys are not. *See id.* Verkuil notes that in 1971 "the bulk of our approximately $40 billion of annual imports [was] financed by letters of credit." *Id.* at 716 (brackets added).

A. The Decision Below Conflicts with Federal Legislation which Encourages Banks to Rely on Documents of Title as Collateral

The majority decision of the circuit court declared this method of secured financing unreasonable as a matter of law. It held that documents of title and the goods they control are inherently untrustworthy and that banks cannot rely on their validity because such reliance is "no more than a bet on the roll of the dice." A-15. This holding is in direct conflict with federal statutory law and is inimical to commerce.[9]

In 1916 Congress enacted the Federal Bill of Lading Act, 49 U.S.C. §§ 81 *et seq.* (1916), to preserve the integrity of bills of lading. The purpose of the Act was to ensure that banks did not have to "roll the dice" in relying on documents of title and to encourage banks to so rely. Noting that banks annually advanced over $5,000,000,000 on bills of lading as collateral, Senator Pomerene's report concluded that it "must follow, therefore, that any reasonable legislation which will lead to the security of these bills of lading in the hands of their owners or holders must be of immense value to the commerce of the country." S. Rep. No. 149, 64th Cong., 1st Sess. 2 (1916). *See also* H.R. Rep. No. 847, 64th Cong., 1st Sess. 2-3 (1916). In response,

> [T]he Federal Bill of Lading Act was passed to eliminate opportunities of irregularity and fraud with regard to the

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[9] The majority decision appears to have relied on certain dicta in *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986), in which this Court addressed the sole issue whether a standby letter of credit backed by a contingent promissory note constituted an insured FDIC deposit. The court below apparently read a single sentence in the opinion — that in a commercial letter of credit, the customer would "typically" pledge funds to the bank when it issues the letter of credit, 476 U.S. at 440 — as precluding any other forms of collateral arrangements, such as secured letter of credit financing. This interpretation of *Philadelphia Gear* is wholly unjustified, as the case had nothing to do with commercial letters of credit — indeed this Court distinguished commercial credits from standby's, *id.* at 428 — and this Court certainly was not declaring bank reliance on documents of title unreasonable as a matter of law. *See supra* nn. 6-8.

> issuance of such bills [of lading], so as to encourage the advance of money to businesses by banks, with the bills as security. If banks could depend on the integrity of bills of lading, they could loan money on such instruments without fear of loss.

United States v. Castro, 837 F.2d 441, 444 (11th Cir. 1988) (brackets added).[10]

The holding below that banks can not rely on documents of title is directly contrary to the purpose of the Federal Bill of Lading Act, and the court's conclusion that "the bank . . . has no guarantee that these documents [of title] are genuine, nor is it entitled to one" is inconsistent with 49 U.S.C. § 114(a), by which the beneficiary guaranties to the issuing bank the genuineness of the documents of title.[11] *See also* 49 U.S.C. § 116 (recognizing mortgagee holding bills of lading as security); § 119 (providing for the rights of a bona fide purchaser as against unpaid seller); § 122 (defining "purchase" as including taking by mortgage or pledge).

Congress again recognized the importance of bank reliance on bills of lading as collateral in financing international trade by enacting the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300 *et seq.* (1936). One of the purposes of COGSA was to preserve the integrity of, and promote bank reliance on, bills of lading in foreign trade. *See Spanish-American Skin Co. v. M. S. Ferngulf*, 143 F.Supp. 345

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[10] In *Castro*, the Eleventh Circuit affirmed Duque's conviction for pledging false bills of lading in violation of the Federal Bill of Lading Act. Thus, the Eleventh Circuit has issued two decisions on the Duque bill of lading fraud: one noting that Congress passed a federal statute to preserve the integrity of bills of lading and to encourage banks to rely on them as collateral; and the decision in this case, holding that documents of title are not worthy of bank reliance and cannot be relied upon as a matter of law.

[11] The panel's reasoning speculating that the goods "could" be defective cannot justify declaring reliance on bills of lading unreasonable. The beneficiary warrants to the issuing bank, under 49 U.S.C. § 114(d), that the goods are conforming. In the vast majority of letter of credit transactions, the goods conform.

(S.D.N.Y. 1956), *aff'd*, 242 F.2d 551 (2d Cir. 1957); 46 U.S.C. § 1303(4) (bills of lading are *prima facie* evidence of the information specified in them).[12]

B. The Decision Below Conflicts with the Principles Stated by this Court in *United States v. Ferger*, 250 U.S. 199 (1919), *Decatur Bank v. St. Louis Bank*, 88 U.S. (21 Wall.) 294 (1875), and *in Other Decisions*

In *United States v. Ferger*, 250 U.S. 199 (1919), this Court upheld the constitutionality of the Federal Bill of Lading Act in a case where defendant obtained a bank loan by pledging forged bills of lading. In sustaining the power of Congress to regulate bills of lading in interstate commerce, this Court concluded as self-evident that documents of title play a critical role in our economy by providing financing in an enormous number of transactions in domestic and foreign commerce:

> [A]s instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and

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[12] Every state has adopted provisions of the Uniform Commercial Code, which, like the Federal Bill of Lading Act, recognize the right of a bank issuing a letter of credit to rely on bills of lading as collateral. *See, e.g.*, U.C.C. §§ 1-202, 7-501, 7-502, 9-304, 9-305. The decision abrogates these U.C.C. provisions as well.

> foreign exchange is also so certain and well known that we may notice it without proof.

250 U.S. at 204-05. The decision below is totally inconsistent with this Court's conclusion that documents of title are the centerpiece instruments in financing commerce on which our economy largely depends.

The decision below also conflicts with the principles stated by this Court in *Decatur Bank v. St. Louis Bank*, 88 U.S. (21 Wall.) 294 (1875). There, a bank issued a letter of credit for its customer and relied on the bills of lading and the goods as collateral in the transaction. This Court declared:

> The [beneficiary] to which this letter [of credit] was addressed doubtless thought [the issuing bank] trusted in some degree to the pecuniary responsibility of [the customer], but it had no right to suppose that the letter of credit was given solely on this account. *On the contrary, the letter is based on the idea that shipments of stock would protect the drafts. If [the customer] was responsible, still the [issuing] bank did not trust to this alone, but relied on the security which was to accompany the drafts. This it had a right to do, and its conduct was very natural under the circumstances.*

Id. at 299 (brackets and emphasis added).

This Court has consistently recognized that banks may rely on bills of lading as collateral to finance their customers' purchases of goods. *Means v. Bank of Randall*, 146 U.S. 620 (1892); *North Pa. R.R. Co. v. Commercial Bank of Chicago*, 123 U.S. 727 (1887); *National Bank v. City Bank*, 103 U.S. 668 (1880). This well-settled principle applies with even greater force to documents of title presented under commercial letters of credit, the predominant payment and financing mechanism in world trade. *See* W. Hawkland, *Uniform Commercial Code Series* § 5-101:02 (1990) ("Letters of credit . . . continue to be highly important in international business transactions all over the world, financing thousands of transactions worth billions of dollars every day.") (footnote omitted).

C. The Decision Below Conflicts with the Principles Stated in Decisions of Other Circuit Courts

The holding that documents of title are unworthy of bank reliance conflicts with the principles stated in decisions of the Second and Fifth Circuits. In *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986), the Second Circuit observed:

> [A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. . . . The necessity of maintaining the integrity of and confidence in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of COGSA.

779 F.2d at 845. Similarly, in *Morrison Grain Co. v. Utica Mutual Ins. Co.*, 632 F.2d 424 (5th Cir. 1980), the Fifth Circuit stated:

> The importance of the bill of lading as a commercial document is evident. Ocean bills of lading have been treated as negotiable instruments for well over a hundred years. They have been accorded the status of full negotiability under Federal law in both the Federal Bills of Lading Act (1916), popularly called the Pomererene [*sic*] Act, and the Carriage of Goods by Sea Act (1936). As negotiable instruments, ocean bills of lading are regularly relied upon by sellers, buyers and banks in the negotiations of transactions throughout the globe, and the record indicates they were so relied upon in this case. Their reliability is further assured in that the ocean carrier, by issuing a clean bill of lading, binds itself and is

only discharged upon actual delivery of the goods to the holder of the bill.

632 F.2d at 432-33 (citations and footnotes omitted). *See also West India Indus. v. Tradex, Tradex Petroleum Services*, 664 F.2d 946, 949 (5th Cir. 1981) (ocean bill of lading is one of the indispensable instruments in financing movement of goods throughout the world).

D. The Decision Below Severely Impairs Commerce

Commerce depends on the willingness of banks to provide financing for the purchase of goods. Secured letter of credit financing, which has been extant for more than a century in the United States, is a major source of such financing.[13] Congress has encouraged banks to rely on bills of lading as collateral, as have decisions of this Court and other circuit courts of appeal. If the decision below remains the law, banks will be reluctant to provide such financing for fear of engaging in unreasonable banking practices. Commerce will be deprived of an indispensable source of trade financing and will inevitably suffer.[14]

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[13] *See supra* n.6. Scholars have traced letter of credit financing as far back as the twelfth century. *See* Verkuil, *Bank Solvency and Guaranty Letters of Credit*, 25 Stan.L.Rev. 716 n.1 (1973). The decision below cited Verkuil to support its conclusion that commercial letter of credit transactions are unsecured lending, but Verkuil directly contradicts that view:

> It is thus one of the important features of the traditional letter of credit that when the bank pays it has in its hands security in the form of title to the goods. . . . But in all events the bank's letter of credit issued for its customer is, in function, a secured loan, and the bank's lending risks should be measured in light of that fact.

Id. at 721.

[14] Republic is located in Miami, Florida, which is a principal banking center in the United States for international trade. Banks in Alabama and Georgia — also coastal states within the Eleventh Circuit that conduct international trade — will also be directly affected by the decision below.

The decision will also impair the viability of trust receipt financing. In such financing, the customer pledges to the bank the documents of title presented by the beneficiary. To facilitate the customer's ability to resell the goods, the bank agrees to deliver the documents of title to the customer in exchange for a trust receipt. The trust receipt constitutes the customer's agreement that any proceeds received from an interim sale of the goods will be held in trust for the bank. The efficacy of such financing is that the customer can resell the goods without impairing the bank's collateral position. *See Societe Generale v. Federal Ins. Co.*, 856 F.2d 461, 462 (2d Cir. 1988) (describing trust receipt financing involving Duque); *United States v. Castro*, 829 F.2d 1038, 1042 (11th Cir. 1987) (same), *modified in part*, 837 F.2d 441 (11th Cir. 1988); H. Harfield, *supra*, Ch. 5.

Trust receipt financing has been recognized in the United States for at least a century. *See, e.g., Commercial Nat'l Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520 (1916). The decision below declares the very premise of such financing — bank reliance on the documents of title and the goods as collateral — unreasonable as a matter of law, which will undoubtedly impair this established method of financing as well.

The decision also severely hampers the $75 billion market for bankers' acceptances. In commercial letter of credit transactions, the seller often agrees to present a draft payable over time. If the beneficiary's presentation complies with the terms of the letter of credit, the bank will accept the draft, which will be payable on the date specified therein. Attached to the draft are the documents of title. Once accepted by the bank, the draft becomes known as a "bankers' acceptance." *See* H. Harfield, *supra*, Ch. 7 at 88.

There is a well established market in the United States for bankers' acceptances, which are negotiable instruments bought and sold among banks and in the private sector. *Id.* at 91. Bankers' acceptances are deemed secured instruments since the documents of title accompany the acceptances. Outstanding bankers' acceptances exceed $75 billion in the

United States. As letter of credit commentators, who have decried the decision below, recently observed: "[T]he $75 billion - plus bankers' acceptance market would indeed be shaken to its roots if Judge Tjoflat's thesis is correct. In point of fact, it is not." *See* Byrne, *Update Docket,* LC Update 19 (July 1990).

Commercial letters of credit are "used to finance millions and millions of dollars of goods in international commerce every day of the year." Funk, *Letters of Credit: UCC Article 5 and Uniform Customs and Practice,* 82 Banking L.J. 1035, 1037 (1965). There is nothing inherently evil or untrustworthy about such transactions. To the contrary, commercial letters of credit are the principal method of conducting and financing world trade. This Court should grant certiorari to remedy the unsound decision of the court below.

III. THE BANKERS BLANKET BOND COVERS FORGED DOCUMENTS OF TITLE PRESENTED UNDER LETTERS OF CREDIT

Although banks clearly are entitled to rely on documents of title to finance the purchase of goods through commercial letters of credit, there does exist the possibility that the bills of lading could be forged. But the answer to eliminating forgery risk is not to declare an indispensable method of financing unreasonable as a matter of law. Rather, the answer is to insure the risk. That is precisely what Republic did by purchasing Clause (E) coverage in the bankers blanket bond.[15]

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[15] The majority decision's reliance on Republic's negligence in the transaction to defeat Clause (E) bond coverage directly conflicts with the Fifth Circuit's decision in *First Nat'l Bank of Fort Walton Beach v. United States Fidelity and Guar. Co.,* 416 F.2d 52 (5th Cir. 1969) (interpreting Clause (E), negligence of the bank is *not* a defense under the bankers blanket bond).

Clause (E) of the bond provides coverage for:

> Loss resulting directly from the [bank's] having, in good faith, . . . acquired, sold, or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any original . . . [forged] Document of Title [defined to include a bill of lading].

A-12-13 (brackets added). The majority held that this language does not protect a bank that relies on forged bills of lading in financing the purchase of goods under a commercial letter of credit. By depriving banks of this insurance protection, the decision below threatens the viability of such financing and banks' willingness to provide it.[16]

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[16] The conclusion of non-coverage cannot be justified. The majority erroneously concluded that Republic suffered the loss when it issued the letter of credit. But the issuance of a commercial letter of credit is *not* an unconditional obligation. The issuer's duty to pay is wholly contingent on its receipt of facially conforming bills of lading. Republic was not irrevocably committed to doing anything until it received conforming bills of lading, its collateral in the transaction. As the dissent and the trial judge recognized, the loss resulted from the *honoring* of the letter of credit, which occurred *after* the forged bills of lading were delivered to and examined by Republic. *See Hamilton Bank v. Insurance Co. of N. Am.*, 557 A.2d 747 (Pa. Super. Ct. 1989) ("In order to recover under the provisions of the bond, we find that Bank would have needed to extend credit in reliance on original bills of lading (not mere photocopies) which should have been in the Bank's actual physical possession *prior to release of the funds.*") *Id.* at 751 (emphasis added).

The majority also ignored that under a commercial letter of credit, the bank "acquires" and "gives value" on the bills of lading when it pays the beneficiary's draft, 49 U.S.C. § 111, "extends credit," *i.e.* loans money, to its customer only when it pays the draft, *Verkuil, supra*, 25 Stan.L.Rev. 716 at 723, "assumes liability" to the beneficiary only after presentation of facially conforming bills of lading, U.C.C. § 5-114(1), and "otherwise acts upon" forged bills of lading by paying the beneficiary's draft and retaining the bills of lading as collateral, *cf. Richardson Nat'l Bank v. Reliance Ins. Co.*, 491 F. Supp. 121, 124 (N.D. Tex. 1977), *aff'd*, 619 F.2d 557 (5th Cir. 1980). All of these events of coverage occurred *after* Republic had possession of and examined the original bills of lading. *See French Am. Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 609 F. Supp. 1352, 1358 (S.D.N.Y. 1985) (Clause (E) language covered

This unprecedented interpretation of Clause (E) will have a substantial adverse effect on the banking industry, as the decision could lead to millions of dollars in uninsured and uninsurable losses. Virtually every bank carries a bankers blanket bond which is standard throughout the industry. *Hamilton Bank v. Insurance Co. of N. Am.*, 557 A.2d 747, 749 n.2 (Pa. Super. Ct. 1989). Clause (E) of the bond is designed to protect banks from losses resulting from acting upon, in any of seven different ways, forged, altered or counterfeit documents on which banks rely every day in transacting business.[17] Clause (E) also provides that the bank must have the original instrument before it can claim reliance upon it:

> Actual physical possession of the [covered document] by the [bank], its correspondent bank or other authorized representative, is a condition precedent to the [bank's] having relied on the faith of, or otherwise acted upon, such items.

A-12-13 (brackets added).

In standard banking practice, a bank almost always first makes a credit decision to loan money, then agrees to loan the money and then makes the loan. A bank receives the instruments covered by the bond when its funds are advanced, not when it agrees to make the loan. A bank would never have an executed promissory note or mortgage at the time its loan committee approved the loan. Nor would the bank have the required loan documents when it agrees to make a loan conditioned upon its receipt of the documents.

Yet, the majority decision held the bank must have the original covered instrument when it makes the credit deci-

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bank which advanced funds to Colombian Coffee Company and Duque after receiving forged bills of lading from Colombian as collateral; bank's good faith question of fact for trial); *American Ins. Co. v. First Nat'l Bank in St. Louis*, 409 F.2d 1387 (8th Cir. 1969) (Clause (E) covered bank which advanced funds after receipt of forged shipper's copy of bill of lading accepted as collateral).

[17] Clause (E) lists the following covered documents: securities, *documents of title*, deeds, mortgages, certificates of origin, certificates of title, evidence(s) of debt, guaranties, and security agreements. A-12-13. (emphasis added).

sion or enters into an agreement to loan money contingent upon its receipt of the loan instruments. The court inexplicably concluded that Clause (E) does not cover a bank even if it receives and relies upon the forged original document prior to advancing the funds. As Judge Brown observed in dissent:

> Since the court's declaration would eliminate coverage for, say, a forged corporate guarantee, this is almost like saying to a bank paying substantial premiums for supposed coverage, "thanks so much, but you have bought a pig in a poke." *See* (E)(1)(f)(i).

A-18. The interpretation of the bankers blanket bond by the majority should not be the law in the Eleventh Circuit.[18]

CONCLUSION

This Court should grant the petition for writ of certiorari, vacate the judgment below, and reinstate the judgment of the district court.

Respectfully submitted,

Stanley A. Beiley*
David S. Garbett
Lisa A. Landy
*Counsel of record

PAUL, LANDY, BEILEY &
HARPER, P.A.
Penthouse, Atico Financial Center
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300
Attorneys for Petitioner

August 31, 1990

[18] The Eleventh Circuit's construction of Clause (E) cannot be cured by rewriting the bond since the court below held that banks act unreasonably, as a matter of law, where they rely on documents of title as collateral. It is hard to conceive of a policy provision which could insure a bank where it engages in a banking practice which an appellate court has held unreasonable as a matter of law.

90-370

(2)

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1990

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Respondent.

APPENDIX

STANLEY A. BEILEY*
DAVID S. GARBETT
LISA A. LANDY

*Counsel of Record
Paul, Landy, Beiley & Harper, P.A.
Penthouse, Atico Financial Center
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300

Attorneys for Petitioner

TABLE OF CONTENTS

REPUBLIC NATIONAL BANK OF MIAMI,
a National Banking Association,
Plaintiff-Appellee,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation, Defendant-Appellant.

Nos. 87-6034, 88-5185.

United States Court of Appeals,
Eleventh Circuit.

Feb. 20, 1990.

James S. Crowder, Jr., Kimbrell & Hamann, Miami, Fla., for defendant-appellant.

Stanley A. Beiley, David S. Garbett, Paul, Landy, Beiley & Harper, Miami, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge,
JOHNSON, Circuit Judge, and
BROWN*, Senior Circuit Judge.

TJOFLAT, Chief Judge:

In this case, Republic National Bank of Miami (Republic) issued a letter of credit on behalf of the Colombian Coffee Corporation (Colombian) in favor of Luis A. Duque Pena e Hijos, Ltda. (Limitada)[1] to facilitate the supposed

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* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] The parties and the district court consistently referred to Luis A. Duque Pena e Hijos, Ltda., as "Limitada." We will do likewise in this opinion.

purchase and sale of coffee. The transaction having gone awry, Republic sought to recover its loss by filing a timely claim against the coverage afforded by a banker's blanket bond issued by the Fidelity and Deposit Company of Maryland (Fidelity).[2] Fidelity denied Republic's claim, concluding that the bond did not cover the risk taken by Republic in its letter of credit transaction. Republic subsequently brought suit in the Circuit Court of Dade County, Florida; Fidelity thereafter removed the case to the United States District Court for the Southern District of Florida. *See* 28 U.S.C. § 1441(a) (1982). After a bench trial, the district court found in favor of Republic. Fidelity now appeals. We reverse.

I.

The parties' dispute in this case arises from a commercial transaction involving Republic, Colombian, and Limitada. Because the parties contest the legal significance of Republic's actions during the course of this transaction, we begin our discussion by outlining a paradigmatic letter-of-credit/bill-of-lading transaction, its legal effect, and its underlying rationale.

A.

In international transactions, a buyer and seller of goods often have never met. In such situations, the seller does not wish to deliver its goods to the buyer before receiving payment; similarly, the buyer does not want to pay the seller before actually receiving the contracted goods. To resolve this problem, such transactions often take the form of a letter-of-credit/bill-of-lading exchange. *See generally* J. White

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[2] A banker's blanket bond is "a broad coverage insurance policy that provides protection against such hazards as embezzlement, burglary, fraud, robbery, and forgery." E. Compton, Principles of Banking 371 (3d ed. 1988).

& R. Summers, Handbook of the Law Under the Uniform Commercial Code § 18-1 (2d ed. 1980).

In such a transaction, a buyer (the customer) asks a bank (the issuer) to issue an irrevocable letter of credit made out in favor of the seller (the beneficiary). In the typical case, the bank requires its customer to deposit funds or collateral sufficient to secure the bank's liability to the beneficiary on the letter. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 440, 106 S.Ct. 1931, 1939, 90 L.Ed. 2d 428 (1986). With a valued customer, however, the bank may accept its customer's note to finance the purchase of the letter of credit.

[1,2] After issuing the letter of credit, the bank delivers the letter to the customer. Upon its delivery, the credit becomes established with regard to the customer, *see* Fla.Stat. § 675.106(1)(a) (1989), [3] and the bank no longer may modify or revoke the letter without the customer's consent, *see id.* § 675.106(2). The customer then delivers the letter of credit to the beneficiary. At this point, the credit becomes established with regard to the beneficiary, *see id.* § 675.106(1)(b), and the bank no longer may modify or revoke the letter without the beneficiary's consent, *see id.* § 675.106(3).

[3-5] Upon receiving the letter of credit, the beneficiary delivers the contracted goods to a carrier, receiving from the carrier a bill of lading. *See generally id.* §§ 677.101-.105, .301-.603. The beneficiary then presents the letter of credit and bill of lading to the issuing bank. Significantly, the bank has no obligation to determine whether the documents presented are in fact genuine; rather, the bank's only duty is to examine the documents on their face to determine that the description of the goods on the face of the bill of lading conforms exactly to the description recited on the face of the letter of credit. *See id.* § 675.114(1). If the documents conform, the

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[3] We cite to the Florida codification of the Uniform Commercial Code because this case arises under our diversity jurisdiction.

bank must honor the letter by the third banking day following receipt of the documents. *See id.* §§ 675.112, .114(1).[4]

[6,7] Upon honoring the letter of credit, the bank is immediately entitled to a fee for issuing the letter of credit, generally one-quarter of one percent of the face value of the letter of credit. *See* Verkuil, Bank Solvency and Guaranty Letters of Credit, 25 Stan.L.Rev. 716, 721 n. 29 (1973). More importantly, however, the bank is also immediately entitled to reimbursement from its customer for the amount of money disbursed to the beneficiary, unless the agreement between the bank and the customer otherwise provides. *See* Fla.Stat. § 675.114(3). Until such reimbursement is made, the bank's agreement with its customer invariably allows the bank to hold the bill of lading and other documents presented by the beneficiary as a security interest. *See generally* 7 R. Anderson, Uniform Commercial Code § 5-114:23 (3d ed. 1985). Thus, until the customer pays the bank, he has no access to the goods purchased from the beneficiary.

[8] Should the customer default on his obligation, the bank has the right to sell the goods represented by the held documents. *See id.* § 5-114:25; *see also* Fla.Stat. § 679.504 ("[s]ecured party's right to dispose of collateral after default"). The value of this security interest, however, is dubious. The bank may have honored the letter of credit without realizing that the documents presented by the beneficiary were forged or counterfeit. In such a case, of course, the bank's security interest in the documents is worthless. But even absent such fraud, there is always the risk that the goods represented by the documents of title will be nonconforming,

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[4] The U.C.C. provides for only one exception to this duty to pay. This exception arises when the customer discovers and informs the bank that the beneficiary has engaged in forgery or fraud. Even in such a situation, however, the bank has the right to honor the letter of credit if it chooses to do so, *see* Fla.Stat. § 675.114(2)(b), and in fact the bank must honor the letter if presented by another bank which has status as a holder in due course, *see id.* § 675.114(2)(a).

damaged, or otherwise devalued. In fact, this risk is quite substantial since the customer is most likely to default on his obligation precisely when the received goods are nonexistent or worth substantially less than the purchase price already tendered to the seller by means of the letter of credit. *See* Verkuil, *supra*, at 721 n. 28.

Upon reimbursing the bank, the customer receives from it the bill of lading and other documents presented by the beneficiary. The customer presents those documents to the carrier, who then turns over the contracted goods to the customer.

Because both the buyer and seller rely not on the other's good faith, but rather on the good faith of the bank and the carrier, the transaction protects the interests of both the buyer and the seller. Through the letter of credit, the seller receives an irrevocable right to payment, not from the buyer, who might become insolvent or refuse to pay, but from the bank. The bank, however, will not pay on the letter of credit until the seller presents the letter of credit along with the bill of lading and certain other documents. These documents establish that the seller has consigned the contracted goods to the carrier and irrevocably bind the carrier to deliver the contracted goods to the buyer upon presentation.

With this model in mind, we turn to the facts of the instant case. [5]

B.

Republic entered into the transaction at issue in this case as a result of its relationship with Alberto Duque, a client of the bank. Duque first contacted Republic by a letter dated July 26, 1982, in which he requested a nine-day, unsecured personal loan of $1,800,000. Duque's letter was written on the

[5] The parties do not dispute the facts; rather, they dispute the facts' legal significance.

stationery of Duque Industries, N.V., and was accompanied by a financial statement that showed Duque's net worth to be $113,057,079. The statement disclosed that Duque had interests in Colombian (a New York-based coffee broker) and the Duque Group, Colombia. Republic's own investigation revealed that the Duque Group was owned solely by Duque, his father and his brothers and that the company controlled the second largest exporter of coffee in Colombia, Limitada. Republic also discovered that Duque owned 87.4% of the City National Bank Corporation, the parent corporation of the City National Bank of Miami.

Three days later, on July 29, Republic's loan committee approved an unsecured, seven-day loan to Duque in the amount of $500,000 for the purchase of coffee. The loan closed that same day, and Duque used its proceeds to open a personal checking account at Republic. Duque also executed and delivered to Republic on July 29 a power of attorney authorizing Camilo Bautista to act in connection with Duque's account in all respects as Duque himself. Republic's records listed the account as belonging to "Duque, Alberto, with Power of Attorney to Camilo Bautista." This first loan was repaid on August 9, 1982.

On August 27, 1982, Duque again wrote to Republic on the letterhead of Duque Industries, requesting a second personal unsecured loan to facilitate the purchase of coffee, this time in the amount of $750,000. On September 2, Republic's loan committee approved a thirty-day, $500,000 unsecured personal loan to Duque, and the bank made the loan. The committee's approval memorandum noted that Duque was principal stockholder in City National Bank Corporation and that Duque also owned interests in the General Coffee Corporation (a coffee roaster and wholesaler), Colombian, and other companies.

On October 4, 1982, Bautista, writing on the letterhead of Duque Industries, requested a sixty-day extension of Duque's $500,000 loan. Bautista's letter was accompanied by

a check for $6,575.35 drawn on the account of the General Coffee Corporation in payment of the accrued interest on Duque's loan. On October 7, Republic's loan committee approved the extension. On December 6, Republic received a check from the General Coffee Corporation in the amount of $513,369.85 in payment of Duque's second personal loan, plus the interest for the extended period.

On December 28, Bautista, again writing on the letterhead of Duque Industries, requested a third $500,000 unsecured personal loan on behalf of Duque. Republic's loan committee approved the loan on December 30, repayment in ninety days, and the loan closed that same day. The loan committee's approval memorandum again noted Duque's interests in the City National Bank Corporation and Colombian.

On February 3, 1983, while Duque's third personal loan was still outstanding, Bautista requested a letter of credit in the amount of $1,239,000 to finance the exportation of 6000 bags of Colombian coffee. The letter of credit was to be issued by Republic on behalf of Colombian; the beneficiary of the letter of credit was to be Limitada. A holder could draw on the letter upon presenting a set of original invoices, the original "Received on Board" bills of lading, and a certificate of insurance. Bautista further proposed that "the terms would be approximately 45 days; however, how we would structure this is for you to hold the original documents until the coffees arrive on port at which time we would make payment so that you can release the documents to us."

On that same day, Republic's loan committee approved the issuance of an irrevocable letter of credit along the terms suggested by Bautista. The memorandum accompanying the committee's decision related, in addition to the terms and conditions of the letter's issuance, the following information concerning Colombian. Colombian's address was listed as "3400 South Moorings Way, Coconut Grove, Florida 33133" — Duque's home address. The principals of Colom-

bian were listed as Gaston Pereira, President, and Anthony Infante, Director. Financial highlights of Colombian disclosed a net worth of $4,449,300 in 1981 and $4,474,500 in 1982. In addition, the memorandum noted that Colombian's "account relationship" to Republic was through Alberto Duque, who agreed to guarantee Colombian's obligation to Republic. The memorandum concluded with the following remarks:

> Our Institution will hold all original documents presented through the [letter of credit] drawing until the coffees arrive on port at which time payment will be made on the refinancing. . . . Approval of this request is recommended based on Alberto Duque's strong moral and financial position.

Republic subsequently received from Colombian an "Application and Agreement for Commercial Letter of Credit" signed by "Fernando Bautista, Vice President." Republic accepted this application although it had no corporate resolution or any other record or information indicating that Bautista was an officer of Colombian. Relying on Bautista's assertion of authority, Republic issued Irrevocable Letter of Credit No. I-11366 in the amount of $1,239,000 in favor of Limitada on February 14, 1983. At the time Republic issued this letter, the bank's $1,239,000 obligation was secured only by Colombian's promise to repay the bank in forty-five days and Duque's guarantee of that obligation. Colombian's obligation to the bank was evidenced only by the correspondence between Republic and Bautista; the bank had no note or its equivalent from Colombian evidencing its obligation.

On February 15, Bautista sought to draw on the letter of credit, signing as "Vice-President II" of Limitada. The letter was written on the stationery of Duque Industries and was accompanied by the required original invoices and bills of

lading.[6] Republic, however, refused to pay on the letter of credit because Republic had no verification that Bautista had authority to act on behalf of Limitada. After receiving Republic's refusal, Bautista began to confer with bank officers in an attempt to arrive at a mutually acceptable method by which he might draw on the letter of credit.

While these negotiations were proceeding, Republic was considering whether to dishonor a $1,000,000 check drawn on Duque's account at Republic and payable to the General Coffee Corporation. This check had been deposited at a Miami bank and was presented for payment at Republic on February 16, 1983. At that time, Duque's account at Republic had a balance of $12,149.89; thus, honoring the check would result in Duque's account being overdrawn by $987,850.11. Under the Uniform Commercial Code, Republic was required to pay or dishonor Duque's check by midnight on February 17. *See* Fla.Stat. §§ 673.508(2), 674.104(1)(h).

With the midnight deadline in mind, Republic and Bautista eventually agreed to a method by which Bautista could draw on the letter of credit. Specifically, Republic agreed to issue a cashier's check in favor of Limitada drawn on the letter of credit; the cashier's check, however, would bear a restrictive endorsement permitting the check only to be deposited with Republic. Republic further agreed that Bautista could negotiate the check on behalf of Limitada if he could get a bank with which Limitada had an account to guarantee his endorsement.

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[6] Although Camilo Bautista's initial request for the letter of credit, the loan committee's memorandum, and the letter of credit application all anticipated that Colombian would also provide a certificate of insurance, the actual letter of credit omitted this requirement, stating instead that "[w]e understand the insurance will be covered by the Buyers." An employee in Republic's credit department evidently made this alteration without consulting his superiors, having noticed that the coffee was to be shipped "F.O.B." As a result, no insurance certificate was ever required by Republic or provided by any of the participants in the transaction.

In accordance with this arrangement, Bautista presented on February 17 three original invoices and bills of lading to Republic pursuant to the terms of the letter of credit. The bills of lading identified 6000 sacks of coffee received on board from Limitada on February 2. The accompanying invoices were dated February 4 and noted that the coffee was to depart from Colombia on February 9. The invoices further stated that payment terms were "CASH AGAINST ORIGINAL DOCUMENTS . . . AS PER L/C I-11366 of REPUBLIC NATL. BANK OR MIAMI DATED 2/14/83." In examining these documents, Republic made no attempt to inquire why Limitada would have delivered its coffee to a carrier twelve days before Republic had issued a letter of credit in favor of Limitada. Nor did Republic inquire as to why Limitada would allow its goods to depart from Colombia on February 9, five days before the issuance of Republic's letter of credit. Nor did Republic consider how Limitada could have known when it issued the three invoices on February 4 that Republic would issue its letter of credit on February 14 or how Limitada could have known on February 4 what number Republic's letter of credit would bear.

Either not noticing or ignoring these anomalies in the proffered invoices and bills of lading, Republic issued a cashier's check in the amount of $1,239,000 to the order of Limitada. The check was issued on February 17, even though Republic was not required to make payment until three days after demand. *See* Fla. Stat. § 675.112. Later that day, Bautista presented the check for deposit in Duque's account at Republic. The check contained the following endorsements:

> [Rubber Stamped]: FOR DEPOSIT ONLY WITH REPUBLIC NATIONAL BANK OF MIAMI
>
> [By Typewriter]: FOR DEPOSIT ONLY TO ACCOUNT OF ALBERTO DUQUE
>
> ACCT. #220-089-4 LUIS A. DUQUE PENA e HIJOS, LTDA.

[*i.e.*, Limitada]

sd/Camilo Bautista

CAMILO BAUTISTA

Vice President II

ENDORSEMENT GUARANTEED

THE CITY NATIONAL BANK OF MIAMI

CORAL GABLES BRANCH

by [Signature illegible]

Vice-Pres.

In accepting the check, Republic made no attempt to verify City National's guarantee, to inquire whether Limitada maintained an account with City National, or to determine whether City National had any corporate resolution of Limitada in its files. Republic admits that it immediately used the funds deposited in Duque's account to cover Duque's $1,000,000 check, thus meeting its midnight deadline.

On that same day, Republic wrote to Colombian, advising it that Limitada had drawn on the letter of credit and that Colombian owed a payment fee of $3,097.50 for this service, which Republic had charged against Duque's account. Republic's letter specifically stated that the bank "assume[d] no responsibility for the genuineness of the documents or for the quantity or quality of the merchandise represented hereby or for its arrival." Republic eventually received a note for $1,239,000 from Colombian that reflected Colombian's right to forty-five day refinancing commencing on February 17. When this note came due on April 4, Colombian requested and received a fifteen-day extension. Colombian thereafter delivered a renewal note to Republic for $1,239,000, due on April 19. Republic admits it does not know who signed these notes on behalf of Colombian.

On April 19, 1983, Colombian defaulted on its $1,239,000 note. At the same time, the financial community began to discover that Duque had perpetrated a massive fraud in an attempt to keep his family's financial empire afloat. This fraud involved falsely collateralized loans, prohibited insider bank transactions, and corporate legerdemain with the assets of Colombian and General Coffee Corporation. *See generally United States v. Castro*, 829 F.2d 1038, 1039-44 (11th Cir. 1987) (giving a comprehensive description of Duque's fraud), *modified in part*, 837 F.2d 441 (11th Cir. 1988). As a result of these maneuvers, Duque and Bautista were convicted of various offenses. *See id.* at 1044-50. In addition, Duque and several of his companies, including Colombian, filed for bankruptcy in the Southern District of Florida. Upon learning of Duque's fraud, Republic conducted an investigation to locate the coffee described in the bills of lading. This investigation revealed that the bills of lading were forged and that the coffee represented by the bills of lading in fact did not exist.

With these facts in mind, we turn to the parties' dispute over the coverage provided by Fidelity's banker's blanket bond.

II.

[9] Clause (E) of Fidelity's bond insures Republic against, among other things:

> (E) *Loss resulting directly from the Insured having, in good faith, for its own account or for the account of others,*
>
> (1) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any original
>
> (a) Security

(b) *Document of Title* [including a bill of lading]

(c) deed, mortgage or other instrument conveying title to, or creating or discharging a lien upon, real property

(d) Certificate of Origin or Title,

(e) Evidence of Debt,

(f) corporate, partnership or personal Guarantee, or

(g) Security Agreement

which

(i) *bears a signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent, registrar, acceptor, surety, guarantor, or of any person signing in any other capacity which is a Forgery,* or

(ii) is altered, or

(iii) is lost or stolen;

(2) guaranteed in writing or witnessed any signature upon any transfer, assignment, bill of sale, power of attorney, Guarantee, endorsement or any item listed in (a) through (g) above;

(3) acquired, sold, or delivered, or given value, extended credit or assumed liability on the faith of, or otherwise acted upon, any item listed in (a) through (d) above which is a Counterfeit.

(Emphasis added.) The bond further provides that:

Actual physical possession of the items listed in (a) through (g) above by the Insured, its correspondent bank or other authorized representative, is a condition precedent to the Insured's having relied on the faith of, or otherwise acted upon, such items.

Republic argues that it relied on the forged bills of lading in honoring the letter of credit; Republic therefore contends that its loss is covered by the terms of Fidelity's banker's blanket bond. We disagree.[7]

The blanket bond specifically states that actual physical possession of a forged document is a condition precedent to the Insured's reliance upon such a document. The record in this case establishes that Republic entered into a binding contract to finance Colombian's letter of credit on February 3. On February 16, Republic issued its letter of credit. On that same day, Republic's irrevocable obligation to honor the letter became established. Republic did not, however, receive physical possession of the forged bills of lading until February 17, when Limitada first presented them to the bank. Thus, by the time Republic received the forged bills, it already was irrevocably committed to the course of action that resulted in its loss. Republic, therefore, did not have the forged documents in its physical possession at the time it purportedly acted in reliance upon them. In fact, since a beneficiary will *always* present the bills of lading after the bank already has irrevocably committed itself to extend credit to its customer and to honor the letter of credit presented by the beneficiary, the condition precedent contained in the banker's blanket bond will *always* preclude a bank from recovering for a loss arising out of its misplaced reliance on documents of title presented by the beneficiary of that letter of credit transaction.[8]

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[7] We note that Republic evidently was unable to recover any of its loss from Colombian. On appeal, the parties dispute the exact amount of Republic's loss; our disposition makes this issue moot. For purposes of discussion *only*, we assume that the loss was the full value of that letter of credit — $1,239,000.

[8] The dissent attaches more significance to Republic's act of issuing the cashier's check to Limitada than that act deserves. Under Fla. Stat. § 673.303, giving "value" is defined as, among other things, making an "irrevocable commitment to a third person." In the comment following that section, the drafters use a letter of

[10,11] Republic's claim, however, is meritless for another, more fundamental reason. In order to recover under the Fidelity bond, Republic must establish that it *relied* on the forged bills of lading. We believe that accepted standards of commercial reasonableness preclude such a determination as a matter of law.

When a bank issues a letter of credit, it knows that the beneficiary will have to present certain documents before the bank is bound to honor the letter. The bank, however, has no guarantee that these documents will be genuine, nor is it entitled to one. Thus, no bank can reasonably rely on documents presented by a beneficiary to secure the risk that the bank takes in financing a letter of credit on behalf of a customer: such "reliance" is no more than a bet on the roll of the dice.[9] We therefore conclude that when Republic agreed

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credit as an example of such an irrevocable commitment to a third party. *Id.* Uniform Commercial Code comment 6. Therefore, Republic gave value, as that term is used in the U.C.C., when it issued the letter of credit to Colombian; thereafter it simply held the $1,239,000 in trust for the benefit of Limitada with the absolute and irrevocable obligation to tender the funds to Limitada when presented with a bill of lading. Thus, to accept the dissent's argument that Republic gave value when it issued the cashier's check to Limitada, we must hold that Republic gave value twice under the same letter of credit. This Republic could not do.

[9] Of course, any extension of credit entails some degree of risk. A bank's success depends on its being able to quantify the extent of its risk in a particular transaction. The bank does this by thoroughly investigating the financial stability of the borrower. The results of that investigation establish whether the bank can rely solely on the credit of its customer (*i.e.*, an unsecured loan), or whether the bank must impose certain conditions to safeguard its interests (*i.e.*, a mortgage, a guarantee, etc.). In a letter-of-credit/bill-of-lading transaction, however, the bank has no means by which to assess the risk it would be taking if it were to rely on the bills of lading presented by the beneficiary to secure its customer's obligation. Since the underlying rationale behind the letter-of-credit/bill-of-lading transaction form is that neither the buyer or the seller trusts the credit of the other, the bank has no reason to rely upon the good faith of the beneficiary. Nor can the bank rely upon the goods represented by the bills of lading. The bank will first see the bills when the beneficiary attempts to draw

to finance Colombian's request for a letter of credit, the bank did so in reliance on Colombian's credit and Duque's guarantee of that credit.

In so holding, we note that this court has long recognized that a banker's blanket bond " 'is not a policy of credit insurance and does not protect the bank when it simply makes a bad business deal.' " *Calcasieu-Marine Nat'l Bank v. American Employers' Ins. Co.*, 533 F.2d 290, 299 (5th Cir.) (quoting *Allen State Bank v. Traveler's Indem. Co.*, 270 So.2d 270, 273 (La.Ct.App. 1972)), *cert. denied sub nom. Louisiana Bank & Trust Co. v. Employers Liability Assurance Corp.*, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976); *see also East Gadsden Bank v. United States Fidelity & Guar. Co.*, 415 F.2d 357, 359 (5th Cir. 1969).[10] Were we to hold that Republic could recover on a banker's blanket bond in the instant

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on the letter of credit, after which the bank has only three days in which either to honor or dishonor the letter. *See* Fla. Stat. § 675.112. Since the goods represented by the bills of lading normally are in transit to the buyer — and thus are often located somewhere on the high seas — the bank ordinarily will be unable to inspect the condition and value of the goods. Such investigation, of course, would be expensive, and the information gained thereby largely pointless anyway, because whether or not the beneficiary has fullfilled his obligation to the buyer and whether or not the goods are sufficient security, the bank has the duty, absent fraud, to pay on its letter of credit if the documents conform *on their face*. *See id.* § 675.114. Thus, the only person upon whom the bank can rely in issuing its letter of credit — the only person upon whom the bank is *supposed* to rely in issuing its letter of credit — is its customer.

The facts of this case drive home this point. Had Republic truly relied on the bills of lading presented by Limitada as collateral, any number of red lights should have gone off in connection with this transaction. Despite these warning lights, however, Republic remained unconcerned. Why? Because Republic's risk was *not* dependent upon the outcome of the transaction between Colombian and Limitada. Republic's risk was wholly dependent upon the credit of its customer, Colombian, and the guarantor of that credit, Duque.

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

transaction, we would in effect transform the blanket bond into such an insurance policy: our decision would allow banks to rely on documents presented by a beneficiary to a letter of credit transaction not because they are worthy of such reliance, *but rather because the reliability of such documents is insured.* At the least, such a holding would encourage sloppy banking practices such as those Republic employed in this case, for if a bank can rely on the documents of title presented by the beneficiary of a letter of credit, why should it bother to investigate thoroughly the credit worthiness of its customer? At the worst, of course, such a holding would promote outright fraud against the insurer. The result? Insurance companies would either raise their rates, rewrite their policies to exclude coverage under clause (E) or rescind clause (E) coverage altogether. Thus, we believe that no one ultimately would gain from a holding allowing coverage in this case.

III.

We conclude that the district court erred in allowing Republic to recover its loss from Fidelity under the banker's blanket bond. The decision of the district court is accordingly

REVERSED.

JOHN R. BROWN, Senior Circuit Judge, dissenting:

The result of this case is startling, not only in terms of its practical consequences, but equally in terms of the legal pronouncements it makes which, until the Supreme Court of Florida pronounces a decision, are binding on Eleventh Circuit federal litigants and is theoretically persuasive on non-Eleventh circuit litigants.

After holding in effect that the only significant time Republic extended credit was at the moment it issued the irrevocable letter of credit on February 14, 1983, the court, on the basis of the physical possession condition of the

Banker's Blanket Bond[1] (which concededly it did not have at the moment the letter of credit was issued) went on to deliver this surprising statement for all time, for all persons, and all hopeful assureds:

> In fact, since a beneficiary will *always* present the bills of lading after the bank already has irrevocably committed itself to extend credit to its customer and to honor the letter of credit presented by the beneficiary, the condition precedent contained in the banker's blanket bond will *always* preclude a bank from recovering for a loss arising out of its misplaced reliance on the documents of title presented by the beneficiary of that letter of credit transaction.

(Emphasis by the court.)

Since the court's declaration would eliminate coverage for, say, a forged corporate guarantee, this is almost saying to a bank paying substantial premiums for supposed coverage, "thanks so much, but you have bought a pig in a poke." *See* (E)(1)(f)(i).

Perhaps reflecting some doubt about the universal correctness of this sweeping declaration, the court goes on to hold that Republic's claim is meritless "for another, more fundamental reason." *See ante* at page 1263. It then proceeds to develop that reason: failure to prove reliance "on the *forged* bills of lading." (Emphasis added.) This leads the court to announce the proposition — which must be dubious in a world of commerce dependent on the reasonable, if not always legally enforceable, expectation of good faith performance — that in a letter of credit situation the issuing

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[1] The bond provides that:

> Actual, physical possession of the items listed in ¶¶ (a) through (g) above by the Insured, its correspondent bank or other authorized representative, is a condition precedent to the Insureds having relied on the faith of, or otherwise acted upon, such items.

bank "has no guarantee that these [the documented bills of lading] will be genuine, nor is it entitled to one." *Ante* at page 1263. Engaging then perhaps in a sort of Casino (not Lexis) search, the court expresses the legal view that such reliance "is no more than a bet on the role of the dice." *See ante* at page 1263 & n. 9.

Emphasizing the temporal scope of the reliance, the court then concludes that with no possible reliance on bills of lading incapable then of being in its possession: "When Republic agreed to finance Colombian's request for a letter of credit, the bank did so in reliance on Colombian's credit and Duque's guarantee of that credit."

Whatever soundness these there might be in these statements, they dramatically highlight that the court is missing the whole point of this insurance controversy: "The tender of, and reliance on, forged bills of lading at the time the demand is made for performance (payment) by the bank under its letter of credit promise to pay."

The court's emphasis, on the contrary, is on the moment the agreement to issue the letter of credit is made. It is at that time, so the court holds, that reliance by the bank must be solely on the creditworthiness of the customer (requester) and not on any expectation of bills of lading later on. But this ignores what took place, not at the time of the *issuance* of the letter of credit, but at the time of demand for performance of the bank's promise to pay.

There is no dispute about the facts. Indeed, I embrace fully this court's findings which may be pieced together in a single composite quotation:

> On February 15, Bautista sought to draw on the letter of credit. . . . The letter was written on the stationery of Duque Industries and was accompanied by the required original invoices and bills of lading. . . . In accordance with this arrangement, Bautista presented on February 17 three original invoices and bills of lading to

> Republic pursuant to the terms of the letter of credit. The bills of lading identified 6,000 sacks of coffee received on board from Limitada on February 2. Either not noticing or ignoring these anomalies [invoice dated February 4, shipment to be made on February 9, invoice references to a letter of credit to be issued on 2/14/83] in the proffered invoices and bills of lading, Republic issued a cashier's check in the amount of $1,239,000 to the order of Limitada.... On that same day, Republic wrote to Colombian advising it that Limitada had drawn on the letter of credit and that Colombian owed a payment fee of $3,097.50 for this service.

It is uncontradicted that at the time the bank issued its certified check in compliance with the letter of credit, it was in possession of the documented bills of lading and invoices. Whatever may have been the situation at the time the letter of credit was *issued*, it is undisputed that the bank received and acted upon the bills of lading as called for in the letter of credit. Indeed, despite disclaiming, in its letter requesting payment of its service fee, responsibility for the genuineness of the bills of lading,[2] Republic, after Duque's fraud was publicly disclosed, continued its reliance on the bills of lading. Republic, so the court states "conducted an investigation to locate the coffee described in the bills of lading. This investigation revealed that the bills of lading were forged and that the coffee represented by the bills of lading in fact did not exist." *See ante* at page 1261.

This brought the whole thing explicitly within the coverage of (E)(1)(b)(i). The bank, pursuant to (E)(1), gave "value [$1,239,000] . . . on the faith of, or... acted upon

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[2] Republic's letter to Colombian requesting payment of $3,097.50 also stated that the bank "assumed no responsibility for the genuineness of the documents or for the quantity or quality of the merchandise represented hereby or for its arrival." *See ante* at page 1261.

[an] original (b) Document of Title [bills of lading] which were (i) a Forgery.

The District Judge was right. On the literal words of the Banker's Blanket Bond and the facts found by him and articulated by us, it was a classic case of coverage for the consequences of acting upon forged bills of lading which were then in the bank's possession.

I must therefore respectfully dissent.

Filed, U.S. Court of Appeals
Eleventh Circuit, November 14, 1988
Miguel J. Cortez, Clerk

In The United States Court of Appeals for the Eleventh Circuit

NOS. 87-6034 & 88-5185

REPUBLIC NATIONAL BANK OF MIAMI, A National Banking Association,

Plaintiff-Appellee,

versus

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A Maryland Corporation.

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before RONEY, ANDERSON and COX, Circuit Judges.

BY THE COURT:

The appellee's motion to file a reply memorandum is GRANTED and the arguments therein have been considered.

However, the motion to dismiss these appeals is DENIED. The district court entered final judgment on September 29, 1987. Fidelity & Deposit Company of Maryland ("F & D") served a motion to alter the judgment on October 7. This motion sought to amend the judgment by deleting reference to post-judgment interest. As such the motion challenged collateral matters and did not seek reconsideration of the district court's judgment on the merits. *See Buchanan v. Stanships, Inc.*, U.S. , 108 S.Ct. 1130, 99 L.Ed. 289 (1988); *Finch v. City of Vernon*, 845 F.2d 256, 258 (11th Cir. 1988). The motion, therefore, was not pursuant to Fed.R.Civ.P. 59(e) and did not toll the time for taking an appeal. Fed.R.App.P. 4(a)(4). F & D's notice of appeal filed on November 19 is untimely because filed more than 30 days after entry of judgment. Fed.R.App.P. 4(a)(1). However, on October 16 F & D posted a supersedeas bond which satisfies the notice of appeal requirements of Fed.R.App.P. 3(c). *Stallworth v. Shuler*, 758 F.2d 1409, 1410-11 (11th Cir. 1985). Accordingly, the supersedeas bond is construed as a timely filed notice of appeal. Because the appellee's motion to dismiss is denied its motion for appellate attorney's fees is also DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0436-CIV-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation,
Defendant.

MEMORANDUM OPINION

This is a claim by Republic National Bank ("Republic") on a Banker's Blanket Bond for a $1,239,000 loss sustained by the bank on a letter of credit loan collateralized with bills of lading which proved to be forged. The defendant, Fidelity and Deposit Company of Maryland ("Fidelity") has denied the claim on the basis that it was not made in good faith (Republic was so negligent in processing the loan that its actions amounted to "bad faith" under the bond) and on the basis that Republic's loss was not the direct result of reliance upon forged bills of lading (Republic actually never looked to the bills of lading as valuable collateral but looked only to the guaranty of the loan by Alberto Duque). This case was tried before the court without a jury on May 25, 1987 through May 29, 1987.

I

Fidelity issued a standard form Bankers Blanket Bond ("Bond") to Republic. At all material times, the Bond was in full force and effect. The Bond's limits of liability for forgery coverage relevant to this case was $3,500,000.00 and the deductible was $25,000.00

Insuring Agreement (E) provided that Fidelity would indemnify Republic, among other things, for

"(E) Loss resulting directly from the Insured having, in good faith . . .

(1) Acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of or otherwise acted upon an original

. . .

(b) Document of Title,

. . . which

(i) bears a signature . . . which is a forgery . . . "

The Bond, in its "Definitions" section, describes a bill of lading, as a "Document of Title".

Alberto Duque's relationship with Republic began with a letter, dated July 26, 1982, on the letterhead of Duque Industries, N.V., signed by "Alberto Duque, Chairman of the Board", requesting a nine day unsecured personal loan of $1,800,000 (Exhibit "G"). Duque Industries, N.V. did not, at any time, have an account at or any other banking relationship with Republic. The address of Duque Industries, N.V., appearing on its letterhead, was "3400 South Moorings Way, Coconut Grove, Florida." This was the same address as Alberto Duque's home address (Exhibit "H"). With his letter of July 26, 1982, Alberto Duque enclosed a financial statement, as of May 31, 1982, which showed his net worth to be $113,057,079 and included, under the heading "Other Assets", interests in "Colombian Coffee Corp." ("C.C.C") New York and "The Duque Group, Colombia" (Exhibit "H"). An Albert Duque resume, prepared by Republic under date of July 29, 1982, noted that he was the son of Luis Duque, president of the Duque Group, which was owned only by father and sons, and which, under the name of Luis A. Duque Pena e Hijos, Ltda., was the second largest exporter of coffee in Colombia (Exhibit "H"). The Alberto Duque resume also

noted that in 1981 he became owner of 87.4% of City National Bank Corporation (which owned 100% of the stock of City National Bank of Miami).

On July 29, 1982, Republic's loan committee appproved a $500,000 unsecured seven day loan to Alberto Duque at an interest rate of 16½% per annum for the "purchase of coffee" (Exhibit "H"). This loan was the opening deposit in Alberto Duque's personal checking account at Republic under account no. 220-089-4 (Exhibit "F"). Also, on July 29, 1982, Alberto Duque executed and delivered to Republic a power of attorney authorizing Camilo Bautista to act in connection with Alberto's account in all respects as Alberto himself could do. Republic's records listed the account as "Name of account — Duque, Alberto, with Power of Attorney to Camilo Bautista" (Exhibit "F"). The first loan of $500,000 to Alberto Duque was repaid on August 9, 1982, by Republic's debiting Duque's account for principal and interest (Exhibit "J").

On August 27, 1982, Alberto Duque, again signing as Chairman of the Board on the letterhead of Duque Industries, N.V., requested a second personal unsecured loan, this time in the amount of $750,000, for a period of thirty days (Exhibit "K"). On September 2, 1982, Republic's loan committee approved a second $500,000 unsecured personal loan to Alberto Duque for thirty days at the interest rate of 16% per annum for "purchase of coffee". Republic's loan committee approval memorandum noted, among other things, that Duque was Chairman of the Board and principal stockholder of City National Bank Corporation, owning 87.4% of its shares for which he paid $55,755,399 and that, in the coffee business, he held interests in "Colombian Coffee Corp. — N.Y.", General Coffee Corp., and other companies (Exhibit "L"). On October 4, 1982, Camilo Bautista, signing, as president, on the letterhead of Duque Industries, N.V., requested a sixty day extension of Duque's thirty day $500,000 personal loan and delivered to Republic a check of General Coffee Corp., in the

amount of $6,575.35, in payment of the accrued interest (Exhibit "N", Exhibit "54"). On October 7, 1982, Republic's loan committee approved the extension (Exhibit "N"; Exhibit "47"). On December 6, 1982, Republic received a check of General Coffee Corp. in the amount of $513,369.85 in payment of the second personal loan, plus interest for the extended period (Exhibit "O").

On December 28, 1982, Camilo Bautista, signing, as president, on the letter of Duque Industries, N.V., requested a ninety day unsecured personal loan of $500,000 for Alberto Duque (Exhibit "P"). On December 30, 1982, Republic's loan committee approved the third personal unsecured loan to Alberto Duque for ninety days, to become due March 2, 1983, at an interest rate of 15% per annum. Republic's loan committee approval memorandum again set forth the purpose of the loan as "Purchase of coffee" and again noted that Duque was Chairman of the Board and 87.4% stockholder of City National Bank Corporation for which he had paid $55,755,399, and that he held an interest in "Colombian Coffee Corp. — N.Y." (Exhibit "Q"). This third loan, due March 2, 1983, was prepaid, with interest, on February 14, 1983, again by a check of General Coffee Corp. as a condition imposed by Republic on that day of the letter of credit which forms the basis of Republic's claim in this action (Exhibit "S"; Exhibit "X").

On February 3, 1983, Camilo Bautista, signing as president on a letterhead of Duque Industries, N.V., wrote to Fred De La Mata, now the president, and at that time the executive vice president, of Republic "outlining the transaction you discussed with Alberto Duque yesterday" (Exhibit "U"). Bautista's letter set forth the requested terms of a letter of credit in the amount of $1,239,000 to be issued by Republic on behalf of C.C.C. in favor of Limitada in order "To finance the exportation of 6000 bags of Colombian coffee." The letter stated that the "Conditions for Drawing", in addition to invoices and bills of lading, would be a "Certificate of Insurance". The letter also stated that "The terms would be

approximately 45 days" and that Republic would "hold the original documents until the coffee arrives on port at which time we would make payment so that you can release the documents to us" (Exhibit "U"). From prior presentations made by Alberto Duque to Republic, Republic was aware that C.C.C. was a New York company controlled by Duque and was also aware that Duque held a substantial interest in Limitada (Exhibits "H", "L", "Q"). C.C.C. had never had an account at Republic and had never been a customer of Republic. Nevertheless, although Bautista enclosed an audited financial statement of Colombian Coffee with his letter of February 3, 1983 Republic never requested or received a corporate resolution of C.C.C. authorizing the opening of a relationship with Republic or designating the persons authorized to deal with Republic on its behalf. Republic never opened or maintained a credit file on C.C.C.

Under date of February 3, 1983, Republic's staff, under Mr. De La Mata's direction, put together a memorandum to the loan committee (Exhibit "S"). The memorandum listed the address of C.C.C. as "3400 South Moorings Way, Coconut Grove, Florida" (the address of Alberto Duque and of Duque Industries, N.V.) and set forth, among other things, the following:

(a) The "principals" of C.C.C. were Gaston Pereira, President, and Anthony Infante, Director.

(b) The "term" would be "45 day refinancing";

(c) The charges would be the "usual fees for our International Department plus 1% over R.N.B. prime rate for the refinancing";

(d) "Conditions for drawing" were invoices, bills of lading and "Certificate of Insurance";

(e) "Guarantor: Alberto Duque NW $113,057,079-(5/82)";

(f) "Financial Highlights" from Colombian Coffee's audited financial statements for years ending March 31, 1982 and 1981, showing "net worth", respectively, as $4,474,500 and $4,449,300;

(g) "Account Relationship — Alberto Duque, a/c #220-089-4; today's balance — $251,064.89";

(i) "Approval of this request is recommended based on Alberto Duque's strong moral and financial position."

(j) "This request was approved by our Loan Committee meeting sustained February 3rd, 1983."

No testimony was offered to identify the handwriting in the upper right hand corner of the memorandum (Exhibit "S") which purports to be the approval of the loan committee. As appears from the foregoing, Republic never received or sought a request for the letter of credit from C.C.C. and relied solely on the self-asserted authority of Alberto Duque and Camilo Bautista to act on behalf of C.C.C., although Republic's own staff memorandum (Exhibit "S") stated that the "principals" of C.C.C. were "Gaston Pereira, President" and "Anthony Infante, Director".

Under date of February 3, 1983, Alberto Duque, personally, executed and delivered to Republic on Republic's printed form his "Unlimited Guaranty" of all obligations of C.C.C. to Republic (Exhibit "DD").

Under date of February 9, 1983, Republic's printed form of "Application and Agreement for Commercial Letter of Credit" signed on behalf of C.C.C. by "Fernando Bautista, Vice President" was delivered to Republic (Exhibit "W"). Republic states that it is unable to say where the application was signed or who delivered it, but believes it was signed before delivery to Republic (Composite Exhibit "35", Addendum Answer L(2)). Republic's printed form of Application, under the signature line, states "Kindly Sign with an Autho-

rized Signature Registered With Us", but Republic, as above stated, had neither a corporate resolution from C.C.C., nor any record or other information to indicate that "Fernando Bautista, Vice President" was an officer of C.C.C. Indeed, Republic admits that it made no effort to confirm Bautista's authority (Composite Exhibit "35", Addendum Answer L(2)). The application for the letter of credit (Exhibit "W") gave the address of Limitada as 2701 Le Jeune Road, Suite 408, although the Alberto Duque resume (Exhibit "H") and other documents listed Limitada as located in Bogota, Colombia. The Application (Exhibit "W"), under the heading "Documents Required", listed, in addition to invoices and bills of lading, "Marine Insurance Policy or Certificate, covering not less than invoice value." This was in accordance with the terms set forth in Camilo Bautista's letter of February 3, 1983, (Exhibit "U") and Republic's staff memorandum (Exhibit "S"). However, the letter of credit which was issued on February 14, 1983, omitted this requirement and stated "We understand the insurance will be covered by Buyers". In fact, no insurance certificate was ever required by Republic or provided by anyone. Republic did not contend that it received direction from Alberto Duque or anyone else to delete the presentation of any insurance policy or certificate from the conditions for drawing under the letter of credit; the evidence was that a person in Republic's letter of credit department made the deletion on his own, without consulting his superiors, when he noticed that, according to the application (Exhibit "W"), the shipment was to be "F.O.B.". There was no evidence that Republic at any time discussed the requirement for insurance with anyone either at the time of the purported draw under the letter of credit or when Republic issued and paid its cashier's check.

With respect to the delivery of the letter of credit, which was dated February 14, 1983, in favor of Limitada, a Colombian corporation located in Bogota, Colombia, as beneficiary, Republic was unable to say how the letter of credit was

delivered or to whom, on behalf of Limitada, it was delivered (Composite Exhibit "35, Addendum answers N(1) and N(2)). On February 15, 1983, one day after the issuance of this letter of credit, Camilo Bautista, again on the letterhead of Duque Industries, N.V., this time signing as "Vice-President II" of Limitada, sought to draw under the letter of credit. Bautista's letter stated that the required invoices and bills of lading were enclosed and gave the following direction: "Please wire the proceeds of the above referenced collection of Banque Worms, New York, New York, Account No. 2213-106252 account of Colombian Coffee Company." (Exhibit "Z"). Although the letter of credit was issued on February 14, 1983, the bills of lading certified that the goods were on board the ship on February 2, 1983, and the invoices which were dated February 4, 1983, stated that the ship's departure date was February 9, 1983. The invoices, dated February 4, 1983, also stated that the form of payment was to be "Cash Against Original Documents as per Letter of Credit I-11366 of Republic National Bank of Miami; Dated 2/14/83." On February 15, 1983, the same day on which Camilo Bautista sought to draw under the letter of credit, acting under his power of attorney, he issued Alberto Duque's check for $1,000,000 drawn on Duque's account at Republic, payable to General Coffee Corp. This check was deposited in a Miami bank and reached Republic for payment on February 16, 1983, when Alberto Duque's account at Republic had a balance of $12,149.89, so that payment would result in an overdraft of $987,850.11 (Exhibit "37"). Pursuant to U.C.C. § 3-508(2), § 4-104(h), Republic, in order to meet its "midnight dealine", was required to either pay or bounce the check by midnight of February 17, 1983. However, assuming that demand under the letter of credit was made on February 15, 1983, Republic was not required to make payment under the letter of credit until three days after demand (U.C.C. § 5-112) which would have been February 18, 1983. The attempted draw under the letter of credit on February 15, 1983, was rejected by Republic "because Republic did

not have verification of Bautista's authority to act on behalf of Luis A. Duque Pena e Hijos Ltda. in connection with disposition of the letter of credit proceeds. . ." (Composite Exhibit "35", Addendum Answer 0(2)). According to Republic, "[f]ollowing Republic's refusal to honor Bautista's instructions concerning disposition of the letter of credit proceeds, Republic and Bautista had various discussions concerning the proper disposition of the funds. These conversations culminated in Republic's suggesting that Bautista obtain an endorsement guaranty from a bank which maintained a Luis A. Duque Pena account. Republic did not direct Bautista to contact City National Bank and did not know that Bautista would obtain the endorsement guaranty from the Bank" (Composite Exhibit "35", Addendum Answer Q(1)). On February 16, 1983, Camilo Bautista, his first effort to draw under the letter of credit having been rejected and after "various discussions [with Republic] concerning the proper disposition of the fund", wrote again to Republic, again on the letterhead of Duque Industries, N.V., and again signing himself as Vice-President II of Limitada. In this letter, Bautista wrote, "[a]s per our telephone conversation, I would like to request a change in our wire instructions regarding the above reference collection." The letter then requested that the proceeds of the letter of credit be deposited in Alberto Duque's personal account at Republic (Exhibit "AA"). On February 17, 1983, after written instructions had been received to credit Alberto Duque's personal account with the proceeds, Republic issued its cashier's check to the order of Limitada in the amount of $1,239,000. This check was delivered by Republic to Gaston Pereira, the President of C.C.C., and presumably was delivered by him to Camilo Bautista (Exhibit "30"; Composite Exhibit "35", Addendum Answer Q(2)). Republic offered no evidence to show that Pereira had either actual or apparent authority to receive the check on behalf of Limitada. On the same day it was issued, the check was endorsed, as directed by Republic, for deposit in Alberto Duque's personal account and the

proceeds were deposited in Alberto Duque's personal account. Republic admits that these proceeds were used to Alberto Duque's $1,000,000 check drawn on his account at Republic (Exhibit "37"; Composite Exhibit "35", Addendum Answer Q(7)).

Republic offered no evidence to show that either Camilo Bautista or City National Bank of Miami had either actual or apparent authority to endorse the check made to Limitada, the corporate payee, "for deposit only to account of Alberto Duque." The actual form of the endorsements (Exhibit "T") was as follows:

[Rubber Stamped]: "FOR DEPOSIT ONLY WITH REPUBLIC NATIONAL BANK OF MIAMI

[By Typewriter]: FOR DEPOSIT ONLY TO ACCOUNT OF ALBERTO DUQUE ACCT. #220-089-4
LUIS A. DUQUE PENA e HIJOS, LTDA.

sd/Camilo Bautista
CAMILO BAUTISTA
Vice President II

ENDORSEMENT GUARANTEED
THE CITY NATIONAL BANK OF MIAMI, CORAL GABLES BRANCH

by Signature illegible
Vice-Pres."

It is evident that the rubber-stamped restrictive endorsement assured that the proceeds would be deposited in Republic and nowhere else and, since Alberto Duque was the only one having any connection with the transaction who had an account at Republic, that it would be deposited in his account. Republic did not produce the original of the cancelled cashier's check, and Allan Abess, who first testified that he

believed he signed the endorsement as vice-president of City National Bank, stated that looking only at a copy of the check, he could not be sure it was his signature. Republic, admittedly, made no inquiry to determine who signed the endorsement on behalf of City National Bank and, admittedly, did not inquire whether Limitada maintained an account at City National Bank or whether City National Bank had any corporate resolution of Limitada in its files (Composite Exhibit "35", Addendum Answer Q(4)). In connection with the payment of $1,239,000 into Alberto Duque's account, two promissory notes were executed on behalf of C.C.C. and delivered to Republic. As above stated, the approval of the letter of credit provided for "45 day refinancing." The first note dated February 17, 1983, (the same date as the payment and deposit), in the amount of $1,239,000 had the due date of April 4, 1983. On April 4, 1983, a "renewal promissory note due April 19, 1983" was executed. Further confirming that C.C.C. was not of primary importance in the letter of credit transaction, Republic admits that it "does not know" who signed these promissory notes on behalf of C.C.C. (Composite Exhibit "35", Addendum Answer R and S(1)).

When the promissory note came due, C.C.C. requested an additional fifteen (15) days to pay Republic. Republic granted the extension, and C.C.C. delivered to Republic a renewal note dated April 4, 1983, due on April 19, 1983.

When C.C.C. did not pay Republic after the renewal note came due, Republic conducted an investigation to locate the coffee collateral. Its investigation revealed that the bills of lading held by Republic contained forged signatures of the issuer within the terms of the Bond and that and the coffee represented by the bills of lading did not exist.

Republic gave timely and sufficient notice of its forgery claim to Fidelity on October 25, 1983, and Fidelity thereafter denied the claim. Republic has suffered a loss of $1,239,000.00 plus interest.

II

The first issue the court must resolve is whether Republic acted in good faith in making this collateralized loan to C.C.C. The bond does not define "good faith." The parties agree that the court may rely on the definition of "good faith" in the Florida Uniform Commercial Code, § 671.201(19), Fla. Stat. (1985), which provides:

> "Good faith" means honesty in fact in the conduct or transaction concerned.

The test of good faith under the bond is subjective, that is, did Republic act honestly in fact in the letter of credit transaction. Under Florida law, good faith is not determined from objective standards and does not require that Republic observe reasonable commercial standards, or due care, or prudence in the transaction. *Barnett Bank of Palm Beach County, N.A. v. Regency Highland Condominium Association*, 452 So.2d 587 (Fla. Dist. Ct. App. 1984), *pet. for rev. dismissed*, 458 So.2d 273 (Fla. 1984); *Seinfeld v. Commercial Bank and Trust Co.*, 405 So.2d 1039 (Fla. Dist. Ct. App. 1981); *accord Baraban v. Manatee National Bank of Bradenton*, 212 So.2d 341 (Fla. Dist. Ct. App. 1968) (analyzing "good faith" under Florida's Negotiable Instruments Law). Moreover, negligence of Republic is not a defense under Insuring Agreement (E) of the Bond. *First National Bank of Fort Walton Beach v. United States Fidelity & Guaranty Co.*, 416 F.2d 52 (5th Cir. 1969) (applying Florida law).

In light of the above, Fidelity carries a heavy burden to demonstrate a lack of good faith. It must show that Republic either actively colluded with Duque or had actual knowledge of the Duque fraud but intentionally chose to remain ignorant of it. Fidelity has failed to carry this burden. The court does find that Republic used extremely sloppy banking procedures in processing this loan. Undoubtedly, the bank was dazzled by this new customer with a net worth of $113,000.000. Undoubtedly the guaranty by Duque of the

$1,239,000 loan was a substantial factor in approving the letter of credit transaction. Nevertheless, the record indicates that Republic never approved an un-collateralized loan to Duque in excess of $500,000. The court finds that Republic relied upon the bills of lading in making the loan to C.C.C.

The paperwork at the bank was handled by bank personnel in different departments of the bank. When all this paperwork is put together and viewed at one time, it seems obvious that a reasonably prudent banker would have detected something amiss. However, even if the discrepancies were reviewed by one person prior to the payoff, it is clear that the bank merely would have been guilty of negligence, not fraud. Under Florida law, actual, not constructive, knowledge of the fraud must be proved to constitute a lack of good faith. "[G]ood faith as used in Section 673.302 does not include due care; rather lack of good faith must be the result of actual, not constructive, knowledge of the wrongdoing tantamount to dishonesty or bad faith." *Barnett Bank, supra,* 452 So.2d at 590, *accord, Corn Exchange Bank v. Tri State Lifestock Auction Co.,* 368 N.W.2d 596 (S.Dak. 1985); *Federal Deposit Insurance Co. v. Russo,* 452 N.Y.S.2d 231 (N.Y. Sup.Ct. 1982), *aff'd,* 460 N.Y.S.2d 532, 447 N.E.2d 81 (N.Y. 1983) (mere suspicion of an infirmity is not notice of a defect and does not constitute bad faith). Indeed, even a showing that Republic had knowledge of facts that would cause a "reasonable person" to make inquiry leading to the discovery of the fraud will not negate good faith. Rather, Fidelity must prove that Republic had actual knowledge of the fraud such that the failure to inquire shows willful dishonesty or bad faith. *Dallas Bank and Trust Co. v. Frigiking, Inc.,* 692 S.W. 2d 163 (Tex. Ct. App. 1985). Fidelity failed to prove such actual knowledge on the part of Republic.

The court concludes Republic did not act in bad faith so as to defeat the terms of the bond.

III

The second issue for the court is whether this whole transaction, viewed in its entirety, was merely a loan to Alberto Duque. It is clear that the bond does not provide credit insurance for the bank's business risks. *East Gadsden Bank v. United States Fidelity & Guaranty Co.*, 415 F.2d, 357, 359 (5th Cir. 1969) ("It is plain that the insurer here did not purport to provide a policy of credit insurance."); *Calcasieu-Marine National Bank of St. Charles v. American Employer's Insurance Co.*, 533 F.2d 290, 299 (5th Cir.), *cert. denied*, 429 U.S. 922 (1976). ("... the bond is not a policy of credit insurance and does not protect the bank when it simply makes a bad business deal."); *First National Bank of Memphis v. Aetna Casualty & Surety Co.*, 309 F.2d 702, 705 (6th Cir. 1962) ("It was not intended by the bond to provide credit insurance for the bank...") *Liberty National Bank v. Aetna Life & Casualty Co.*, 568 F. Supp. 860, 866 (D.N.J. 1983) ("It is well settled that the standard bankers bond is not a form of credit insurance").

The question presented concerns the degree to which the bank relied upon the bills of lading. This is not unlike the usual mortgage transaction wherein the bank secures both a note from the borrower and a lien on real property. The bank never expects to foreclose on the mortgage because the loan is based upon the financial ability and integrity of the borrower. But if the note is not paid, the bank will look to the collateral to be made whole. In the instant case, the loan was based primarily upon the guaranty of Duque who claimed a net worth of $113,000,000. When the guaranty was not honored, the bank looked to the bills of lading which were given the bank as collateral.

The court concludes that Republic relied upon the forged bills of lading and Republic's loss was proximately caused by them. Republic accepted and retained the bills of lading as collateral for C.C.C.'s repayment obligation on the letter of credit. The presentation of the forged bills of lading

triggered Republic's decision to pay $1,239,000.00. Thus, Republic gave value "on the faith of" the forged bills. Republic's loss continued to be caused by the forged bills of lading because when Republic resorted to the bills to locate the 6,000 bags of Colombian coffee held as collateral, no coffee existed. Republic's loss therefore comes within Insuring Agreement (E) of the bond. *See American Insurance Co. v. First National Bank in St. Louis*, 409 F.2d 1387 (8th Cir. 1969).

The court rejects Fidelity's reliance on exclusionary provision 2(e) of the bond to negate coverage. That provision simply says the bond does not cover a loss resulting from the nonpayment of a loan *unless* the loss is covered, *inter alia*, under Insuring Agreement (E). As discussed above, Insuring Agreement (E) covers this loss rendering the exclusion inapplicable by its express terms.

Fidelity contends that the loss is excluded because the bond "is not a policy of credit insurance and does not protect the bank when it simply makes a bad business deal." *Calcasieu-Marine National Bank of St. Charles v. American Employer's Insurance Co., supra.* In *Calcasieu-Marine*, the court, applying Louisiana law, held that the bank's decision to extend credit on drafts deposited for collection constituted a "loan" to the customer within the exclusionary provisions of the bond. The court in *Calcasieu-Marine* left undisturbed the lower court's finding that the bank did not rely at all upon any forged documents in giving value, and thus the loss was not covered by any insuring agreement of the bond. In reaching its conclusion, the court relied on *Allen State Bank v. Traveler's Indemnity Co.*, 270 So.2d 270 (La. Ct. App. 1972), which held that the bond did not cover a bank's loss where the forged instrument was given to the bank as collateral *after* the loan was already in default and *after* the loss had already occurred. Unlike here, the forged documents in *Allen State Bank* had nothing to do with the bank's loss but were merely requested by the bank after the loss. Significantly, the court in *Allen State Bank* concluded that if the forged instru-

ments representing the collateral had been given to the bank as an incident to the loan transaction (as was done here), Insuring agreement (E) would have covered the loss:

> Had the assigned notes [which were forged] been pledged at the time of and as an incident and requirement of the loan, and fraud shown on the part of Derouen in connection therewith, then of course, the bank would have been protected, at least under Clause (E).

Id. at 273-4. Therefore, neither *Calcasieu-Marine* nor *Allen State Bank* compels a contrary result here.

The court rejects Fidelity's contention that this loss was not within the scope of coverage (E) of the bond.

IV

Republic has suffered an insured loss of $1,239,000.00 plus interest and is entitled to recover that amount, less the $25,000.00 deductible, from Fidelity. Interest at the statutory rate of 12% shall accrue 60 days from October 25, 1983, the date Republic submitted its claim. Republic is also entitled to recover its costs and reasonable attorneys' fees pursuant to § 627.428, Fla. Stat. (1985). Further proceedings shall determine the amount of reasonable attorneys' fees.

An appropriate final judgment shall be entered in accordance with the foregoing.

DONE and ORDERED at the United States District Court, Miami, Florida this 20 day of July, 1987.

/s/ KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

Filed by Sbh D.C. Sept 29 1987
ROBERT M. MARCH CLERK
U.S. DIST. CT: S.D. OF FLA., MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0436-CIV-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,

Defendant.

FINAL JUDGMENT

Pursuant to the court's memorandum opinion dated July 20, 1987, final judgment is hereby entered for the plaintiff, Republic National Bank of Miami and against the defendant, Fidelity and Deposit Company of Maryland in the amount of $1,214,000 ($1,239,000 less a deductible of $25,000) plus pre-judgment interest at 12% from December 24, 1983 through today's date in the amount of $693,675.36 for a total of $1,907,675.30. Per diem after September 28, 1987 is $399.12. The court reserves jurisdiction to consider applications for attorney's fees and costs.

DONE and ORDERED at the United States District Court, Miami, Florida this 28th day of September, 1987.

By: /s/ KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: Paul Landy Beiley & Harper, P.A.
Kimbrell & Hamann

Filed by sbh D.C. Oct 13, 1987
Robert M. March Clerk U.S. Dist. Ct.
S.D. of Fla, Miami [entered on docket Oct. 16, 1987]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 86-0436-Civ-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO ALTER THE FINAL JUDGMENT

This cause is before the court upon Defendant's motion to alter the final judgment entered in this case by the court on September 28, 1987. Said motion was filed on October 7, 1987.

After a careful review of the pleadings and the court being fully advised in chambers, it is hereby:

ORDERED AND ADJUDGED that said motion is GRANTED: The following line shall be deleted from said final judgment: "Per diem after September 28, 1987 is 399.12."

DONE AND ORDERED in chambers at the United States District Courthouse, Miami, Florida this 9 day of October 1987.

/s/ KENNENTH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

Filed by Sbh D.C. Oct 21 1987
ROBERT M. MARCH CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0436-Civ-RYSKAMP

REPUBLIC NATIONAL BANK
OF MIAMI, a national
banking association,

Plaintiff,

vs.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
a Maryland corporation,

Defendant.

AMENDED FINAL JUDGMENT

Pursuant to the court's memorandum opinion dated July 20, 1987, and Defendant's motion to alter the final judgment entered September 28, 1987, amended final judgment is hereby entered for the plaintiff, Republic National Bank of Miami and against the defendant, Fidelity and Deposit Company of Maryland in the amount of $1,214,000 ($1,239,000 less a deductible of $25,000) plus pre-judgment interest at 12% from December 24, 1983 through October 13, 1987 (the date the parties filed their Stipulation for approval of a supersedeas bond also filed that date by Defendant which was approved by the Court on October 15, 1987) in the amount of $699,662.16 for a total of $1,913,662.10. The Court reserves jurisdiction to consider applications for attorney's fees and costs.

DONE and ORDERED at the United States District Court, Miami, Florida this 21 day of October, 1987.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: Paul Landy Beiley & Harper, P.A.
Kimbrell & Hamann

Filed by D.C. Jan 20 1988
ROBERT M. MARCH CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-0436-CIV-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,
Defendant.

ORDERING AWARDING ATTORNEY'S FEES

The plaintiff has moved for an award of attorneys' fees based upon the successful prosecution of this claim pursuant to §627.428, *Florida Statutes*. The defendant has raised certain legal arguments as to why the plaintiff should either receive no fee or a less than reasonable fee based upon factors established in the record. The court will deal with the defendant's objections first.

The defendant contends that plaintiff has waived its right to attorneys' fees since it was paying it attorneys a monthly retainer and is not seeking for itself any credit on the payments already made to its attorneys for representation in this matter. It was established that any court-awarded fees would go directly to the attorneys to compensate them over and above the monthly retainer. The court rejects the defendant's waiver argument. The fact that the plaintiff intends to give to its attorneys the total amount of any court-awarded fee in addition to th retainer already paid does not constitute

a waiver. While this may be a wind-fall for plaintiff's attorneys, it is only a wind-fall because of the generousity of the plaintiff. Because the plaintiff is generous, the defendant should not receive a wind-fall. Furthermore, the court finds no need for an assignment by the plaintiff to its attorneys for the claim for attorneys fees. The attorneys are presenting this claim on behalf of their clients. They need no assignment to successfully prosecute this claim.

The defendant further argues that any award should be limited to services rendered by the attorneys after January 10, 1986, the date the complaint was filed. Basically, the defendant objects to the payment of fees for the presentation and investigation of the claim. The court rejects this argument also as it would force attorneys to file suit first and investigate the basis for the suit later. Such a course of conduct would place counsel in jeopardy of Rule 11 sanctions. The court finds that time spent in investigating and presenting the claim are compensible under the statute.

The defendant also argues that the plaintiff's claim should be reduced by a percentage which equals the amount plaintiff's counsel contend is their full fee less their retainer payments. Stanley Beiley, an attorney for the plaintiff, testified that his firm generally works for this client at about 25 — 35% below its standard rates. Defendant then argues that the plaintiffs' counsel have been paid at least 65% of its claimed fee of $126,164.00 and should, therefore, be paid no more than $44,157.40 to make up the difference. Once again the court rejects this argument. The award of attorneys' fees is to the plaintiff not to the attorneys. The plaintiff is free to use the award as they see fit. The fact that plaintiff may give the entire award to its attorneys, and thus pay them well above what this court determines to be a reasonable fee, is of no concern to this court.

In determining what a reasonable fee should be in this case, the court is controlled by principles announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 214 (5th

Cir. 1974) and *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). The court will consider each factor set forth in these cases.

1) *The time and labor required*

Plaintiff's attorneys claim that a reasonable fee based upon time alone would be $146,082.50. This claim is supported by a detailed description of the services provided by some 16 different attorneys who worked on the file. Each attorney is listed at a specific hourly rate and this rate is adjusted periodically to reflect either the attorney's increased experience or an increase in the inflationary rate. In making the assessment of a reasonable fee based upon time and hourly rate, the court must exclude any duplication of effort and discount work done by lawyers which could have been done by non-lawyers (*Johnson*, at 488 F.2d 717). The court should also assume that the fee would be paid irrespective of the result (*Rowe*, at 472 So.2d 1150). Since the attorneys for the plaintiff were being paid on a monthly contingency, the bill presented by the attorneys does not come before the court with the same validity as a bill that was paid by the client. The court is forced to examine the facts to determine if the time claimed by the attorneys was reasonable and whether the hourly rate claimed was reasonable.

The plaintiffs called two expert witnesses (Hugo Black, Jr. and Herbert Stettin) to testify that all the hours claimed by plaintiff's counsel were reasonable and necessary and that all the rates charged by plaintiff's counsel were reasonable. The defendant called an expert (Jim Glass) to testify that the time claimed by plaintiff's counsel was not reasonable and that a reasonable fee would be $50,000.00, but if the fee were to be computed based upon the way the plaintiff's counsel handled the case, a reasonable fee would be $100,000. Glass noted that defense counsel expended some 800 hours in defending the case.

The court finds that it was unreasonable to use 16 different attorneys in the prosecution of this claim. The court has analyzed the claim in light of the detailed bill and the court's knowledge of the case having heard all the evidence. The court disallows the time claimed for George Harper, Hilary Langen, Maria Marobotto, Robert Sondak, Sherry Dickman, Fred Woodbridge, Robert Paul and Larry Metsch on the ground that the services rendered by these attorneys did not contribute to the outcome of the case, were duplicitous, represented a training or learning experience for counsel or were unrelated to the issues in the case. The court also finds that the hourly rates for some of the remaining attorneys exceeded the rates in this community for attorneys with similar experience and ability. The court makes this determination based upon the evidence presented and the court's experience of 30 years as a litigator and 20 years as a managing partner of two law firms. The claims for the remaining attorneys are as follows showing both the amount of the claim and the amount awarded by the court:

Attorney	Amount claimed	Amount awarded
David Garbett	75,983.75	62,500.
Stanley Beiley	27,887.50	21,000.
Ricardo Banciella	11,137.50	12,500.
Barry Hunter	2,370.00	1,050.
Steven Eisenberg	4,156.25	750.
Robert Miller	2,665.00	2,665.
Ed Davis	996.25	375.
Mitch Haymes	3,437.50	2,062.50

The reasons for these reductions follow:

David Garbett was the attorney primarily responsible for the handling of this case. He had 1-½ years experience as an attorney when he first appeared in the case. Some of his time was duplicated with other attorneys. The court accepts Mr. Glass' estimate of 500 hours (as opposed to a claim for 584.75) and finds that a reasonable hourly rate for the entire time would be $125.00

Stanley Beiley was the partner assigned to the file. Much of his time was supervision until the time of trial at which time he was more active. The court recognizes 120 hours (as opposed to the claim for 125.5) and finds that a reasonable hourly rate would be $175.00.

The court accepts Mr. Glass' evaluation of 125 hours for Ricardo Banciella and finds that a reasonable hourly rate would be $100.

The court finds that a reasonable hourly rate for Barry Hunter, Steven Eisenberg, Robert Miller, Ed Davis and Mitch Haymes is $75. Their contribution to the case consisted of preparation of memos and research. The court has found that a reasonable amount of time for each of these is as follows:

Attorney	Claimed	Allowed
Barry Hunter	14	14
Steven Eisenberg	33.75	10
Robert Miller	30	30
Ed Davis	14.75	5
Mitch Haymes	27.5	27.5

Based upon the foregoing, the court finds that a reasonable fee for plaintiff's counsel based upon time and hourly rate is $102,902.50.

2. *The novelty and difficulty of the questions*

This case presented a detailed factual pattern which took some time to develop. Basically, the facts were not contested. The primary issue for the court was how to apply the admitted facts to the law. The court found the law to be well-researched by the attorneys. The cases involving this issue were somewhat limited. The court finds that no adjustment should be made for novelty and difficulty of the questions presented.

3. *The skill requisite to perform the legal services properly*

This case was primarily handled by an associate with supervision from a partner. The case was handled skillfully

but the court makes no adjustment on this factor. The hourly rates awarded reflect the skill required to prosecute this action.

4. *The preclusion of other employment by the attorney due to acceptance of the case*

Not applicable.

5. *The customary fee*

The factor has been applied under Section 1.

6. *Whether the fee is fixed or contingent*

The plaintiff has argued that this case was handled on a contingency basis. The facts do not support such a claim. The attorneys were paid in monthly installments their retainer fee. By their own admission, they were paid 65 — 75% of their "normal" rate. This percentage is increased by the court's reduction of some hourly rates. This is not a situation wherein the attorneys have "carried" or "financed" the client for several years as in the usual personal injury claim with a contingency fee arrangement. Since the court finds that no contingency fee was contemplated, the court will not enhance the lodestar fee as is customary to compensate counsel for a contingency risk.

7. *Time limitations imposed by the client or the circumstances*

Not applicable.

8. *The amount involved and the results obtained*

The amount involved was well over a million dollars and the result was positive. This was an "all-or-nothing" case as there was no middle ground for the court to find less than the full claim. The court has considered the amount involved and the resulted obtained under Section #1. Again, the lodestar will not be enhanced based upon the results obtained.

9. *The undesirability of the case*

Not applicable.

10. *The experience, reputation and ability fo the attorneys*

The court has applied this factor in Section #1.

11. *The nature and length of the professional relationship with the client*

The attorneys had a long-standing relationship with the client. Their retainer agreement confirmed this relationship. The attorney had agreed to work for less for this valuable client. The court has adjusted upward the attorneys' fees over the retainer agreement which also provides that any court-awarded fees would go to the attorneys and not the plaintiff.

12. *Awards in similar cases*

In this regard, the court has considered only its experience in some 30 years of experience as a commercial litigator.

Based upon the foregoing, it is

ORDERED and ADJUDGED that the plaintiff is awarded attorneys' fees in the amount of $102,902.50.

DONE and ORDERED at the United States District Court, Miami, Florida this 20 day of January, 1988.

/s/ Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

Filed by D.C. Feb 08 1988
ROBERT M. MARCH CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 86-436 CIV-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Defendant.

ORDER

This cause is before the court upon plaintiff's motion for partial reconsideration of order awarding attorney's fees filed January 26 1988.

After a careful review of the pleadings and the court being fully advised in the premises, it is hereby:

ORDERED AND ADJUGED that said motion is DENIED.

DONE AND ORDERED in chambers at the United States District Courthouse, Miami, Florida this 8 day of February 1988.

/s/ Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: to all counsel of record

Filed U.S. Court of Appeals Eleventh Circuit, June 6, 1990
Miguel J. Cortez, Clerk

In The United States Court of Appeals for the Eleventh Circuit

NO. 87-6034 & 88-5185

REPUBLIC NATIONAL BANK OF MIAMI, A National Banking Association,

Plaintiff-Appellee,

versus

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A Maryland Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PEITITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion February 20, 1990, 11 Cir., 198_, ___F.2d___).

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and BROWN*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

In The
United States
Court of Appeals
for the
Eleventh Circuit

Nos. 87-6034 & 88-5185

D.C. Docket No. 86-0436-CIV-KLR

REPUBLIC NATIONAL BANK OF MIAMI, A National Banking Association,

Plaintiff-Appellee,

versus

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A Maryland Corporation,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and BROWN*, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the

said District Court in these causes be and the same is hereby REVERSED;

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

BROWN, Senior U.S. Circuit Judge, dissented and filed an opinion.

*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Entered: February 20, 1990
For the Court: Miguel J. Cortez,
Clerk

By: /s/ KARLEEN MCNALL
Deputy Clerk

ISSUED AS MANDATE: JUN 22 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 86-0436-Civ-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation,
Defendant.

MOTION OF DEFENDANT, FIDELITY & DEPOSIT COMPANY OF MARYLAND TO ALTER THE FINAL JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

COMES NOW the Defendant, FIDELITY & DEPOSIT COMPANY OF MARYLAND, by and through its undersigned attorneys and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves for entry by the Court of an altered Final Judgment by deleting from the Final Judgment entered by this Court on September 28, 1987 the following sentence: "Per diem after September 28, 1987 is $399.12." As ground for its motion FIDELITY & DEPOSIT COMPANY OF MARYLAND would point out to the Court that this per diem figure was probably included in the Final Judgment through inadvertence as same represents the per diem rate of interest at 12% on $1,214,000.00. A Final Judgment in the Federal Court need not state the per diem interest rate since that is fixed by 28 U.S.C. § 1961 (1982). That Statute calculates interest at a floating rate determined by the coupon yield of United States Treasury Bills, and is automatically applicable. Accordingly, it is respectfully submitted that the Final Judgment should be altered by deleting the aforesaid sentence.

SUPPORTING MEMORANDUM OF LAW

Under Rule 59(e) of the Federal Rules of Civil Procedure a motion to alter or amend the Judgment shall be served not later than ten (10) days after entry of the Judgment. Judgment in this case was entered by the Court on September 28, 1987, and this motion is being served within ten (10) days of entry of the Judgment.

Pre-judgment interest in Florida is figured at the rate of 12% per annum pursuant to the terms of F.S. 687.01. However, post-judgment interest in cases tried in the Federal Courts is determined pursuant to 28 U.S.C. § 1961 (1982), as determined by the Eleventh Circuit Court of Appeals in *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F2d 1526 (1985). Since the Federal Statute is self executing, there is no need for a recitation of the per diem interest in a Final Judgment. However, if the per diem rate is stated, it should be at the applicable rate. $399.12 per diem is not applicable under existing law.

The Judgment should be altered to remove the sentence altogether, or to make reference to the applicable Federal Statute governing post-judgment interest.

Respectfully submitted this 7th day of October, 1987.

KIMBRELL & HAMANN, P.A.
Attorneys for FIDELITY &
DEPOSIT COMPANY OF MARYLAND
799 Brickell Plaza
Miami, Florida 33131
(305) 358-8181

By: /s/ JAMES F CROWDER, JR.
JAMES F. CROWDER, JR.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion was hand-delivered to David S. Garbett, Esq., Paul, Landy, Beiley & Harper, P.A., Attorneys for Plaintiff, 200 S.E. First Street, Miami, Florida 33131, this 7th day of October, 1987.

/s/ JAMES F. CROWDER, JR.
JAMES F. CROWDER, JR.

Filed by _____ D.C. 1987 Oct 13 PM 3:38
Robert M. March Clerk U.S. Dist. Ct. S.D. of Fla.-Miami

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 86-0436-Civ-RYSKAMP

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation,

Defendant.

STIPULATION TO STAY EXECUTION AND FOR APPROVAL OF SUPERSEDEAS BOND

COME NOW the the parties, by and through their undersigned attorneys, and pursuant to Rule 62 of the Federal Rules of Civil Procedure stipulate to entry by the Court of a stay of execution of the Final Judgment entered by this Court on September 28, 1987 pending disposition of Defendant's motion to alter said Judgment made pursuant to Rule 59, and filed with this Court on October 7, 1987, and for a stay pending any ensuing appeal. As security for Plaintiff, the parties ask the Court to approve the Supersedeas Bond filed herewith, the form and amount also agreed to by counsel. As ground for said motions the parties state to the Court that it is the intention of FIDELITY & DEPOSIT COMPANY OF MARYLAND to take an appeal of this Court's Final Judgment, although it currently has pending a motion to alter said Final Judgment to delete therefrom the reference to "per diem" on the grounds set forth in its previously filed Rule 59 motion. Under Federal Rule of Appellate Procedure 4(a)(4)(iii), the filing of a timely motion under Rule 59 to

alter a judgment extends the time for filing a Notice of Appeal, as required under Rule 3 of the Federal Rules of Appellate Procedure, to thirty (30) days from the entry of an order granting or denying such motion. However, under the terms of Rule 62, the judgment creditor is entitled to execution or security, pending the disposition of said Rule 59 motion. Since a Notice of Appeal filed before the disposition of such motion, according to Federal Rule of Appellate Procedure 4, has no effect FIDELITY & DEPOSIT COMPANY OF MARYLAND cannot now appeal. The parties agree the attached Bond affords adequate security to REPUBLIC NATIONAL BANK OF MIAMI in that it is conditioned to pay interest running from the date of entry of the Final Judgment on September 28, 1987 until the appeal, which F & D intends to file in this matter, is either dismissed or affirmed.

Accordingly, in order to afford both parties due process, it is respectfully submitted that this Court should grant to FIDELITY & DEPOSIT COMPANY OF MARYLAND a stay pending disposition of the Rule 59 motion and any ensuing appeal, and approve the attached Supersedeas Bond as secur-

ity for REPUBLIC NATIONAL BANK OF MIAMI pending the disposition of the Rule 59 motion and any ensuing appeal.

PAUL, LANDY, BEILEY & HARPER,
Attorneys for REPUBLIC NATIONAL
BANK OF MIAMI
Penthouse, Atico Financial Center
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300

By: /s/ STANLEY A. BEILEY
STANLEY A. BEILEY

KIMBRELL & HAMANN, P.A.
Attorneys for FIDELITY & DEPOSIT
COMPANY OF MARYLAND
799 Brickell Plaza
Miami, Florida 33131
(305) 358-8181

By: /s/ JAMES F. CROWDER, JR.
JAMES F. CROWDER, JR.

Rec. by _____ Oct 13 1987
Robert M. March Clerk U.S. Dist. Court
S.D. of Fla., Miami

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 86-0436-Civ-RYSKAMP

Florida Bar No. 016867

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation,
Defendant.

CIVIL SUPERSEDEAS BOND

We, FIDELITY & DEPOSIT COMPANY OF MARYLAND, as Principal, and UNITED STATES FIDELITY & GUARANTY COMPANY, as Surety, are held and firmly bound unto REPUBLIC NATIONAL BANK OF MIAMI in the principal sum of Two Million Fifty-Eight Thousand and 00/100 ($2,058,000.00) Dollars, for the payment of which we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally.

The condition of this obligation is: The above-named Principal has entered an appeal to the United States Court of Appeals for the Eleventh Circuit, to review the Final Judgment entered in the above case on the 28th day of September 1987, and filed in the Court file in said case on September 29, 1987.

NOW, THEREFORE, if the Principal shall satisfy the amount of said Judgment in full, including interest accruing at the rate specified in 28 U.S.C. § 1961 (1982) from the date of entry of said Judgment up until the time said appeal is dismissed or said Judgment is affirmed, then this obligation shall be null and void; otherwise, to remain in full force and effect.

The Surety submits itself to the jurisdiction of this Court and agrees that its liability upon this Bond may be enforced by this Court, after motion and notice, without the necessity of an independent action.

Signed on this 12th day of October, 1987 at Baltimore, Maryland.

Principal, FIDELITY & DEPOSIT
COMPANY OF MARYLAND

By: /s/ _____

Signed on this 13th day of October, 1987 at *Plantation, Florida.*

Surety, UNITED STATES FIDELITY
& GUARANTY COMPANY

By: /s/ _____
Attorney-In-Fact

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 86-0436-Civ-RYSKAMP

Florida Bar No. 016867

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Amended Final Judgment entered in this action on the 21st day of October, 1987.

WE HEREBY CERTIFY that a true and correct copy of the Notice of Appeal was mailed to DAVID S. GARBETT, ESQUIRE, Paul, Landy, Beiley & Harper, P.A., Attorneys for

Plaintiff, 200 S.E. First Street, Miami, Florida 33131, this 18th day of November, 1987.

KIMBRELL & HAMANN, P.A.
Attorneys for FIDELITY AND DEPOSIT COMPANY OF MARYLAND
799 Brickell Plaza
Miami, Florida 33131
Tel. (305) 358-8181

By: /s/ JAMES F. CROWDER, JR.
JAMES F. CROWDER, JR.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 86-0436-Civ-RYSKAMP

Florida Bar No. 016867

REPUBLIC NATIONAL BANK OF MIAMI,
a national banking association,
Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a Maryland corporation,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant above named (hereinafter "F&D"), hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order dated January 20, 1988, awarding attorney's fees to Plaintiff pursuant to § 627.428 *Florida Statutes*, which became final upon entry of the Court's Order of February 8, 1988, denying Plaintiff's Motion for Partial Reconsideration of Order Awarding Attorney's Fees and from the Amended Final Judgment entered in this action on the 21st day of October, 1987, as that Judgment may be amended by the Order awarding attorney's fees.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Notice of Appeal was mailed to DAVID S. GARBETT, ESQUIRE, Paul, Landy, Beiley & Harper, P.A., Attorneys for Plaintiff, 200 S.E. First Street, Miami, Florida 33131, this 26th day of February, 1988.

KIMBRELL & HAMANN, P.A.
Attorneys for FIDELITY AND
DEPOSIT COMPANY OF
MARYLAND
799 Brickell Plaza
Miami, Florida 33131
Tel. (305) 358-8181

By: /s/ JAMES F. CROWDER, JR.
JAMES F. CROWDER, JR.

FEDERAL BILL OF LADING ACT, 49 U.S.C. §§ 81-124 (1916)

§ 81. Transportation included

Bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this chapter. Aug. 29, 1916, c. 415, § 1, 39 Stat. 538.

§ 82. Straight bill of lading

A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill. Aug. 29, 1916, c. 415, § 2, 39 Stat. 539.

§ 83. Order bill of lading; negotiability

A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this chapter unless upon its face and in writing agreed to by the shipper. Aug. 29, 1916, c. 415, § 3, 39 Stat. 539.

§ 84. Order bills in parts or sets; liability of carrier

Order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described

therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however,* That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Puerto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing. Aug. 29, 1916, c. 415, § 4, 39 Stat. 539.

§ 85. Indorsement on duplicate bill; liability

When more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however,* That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Puerto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do. Aug. 29, 1916, c. 415, § 5, 39 Stat. 539.

§ 86. Indorsement on straight bill

A straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character. Aug. 29, 1916, c. 415, § 6, 39 Stat. 539.

§ 87. Effect of insertion of name of person to be notified

The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. Aug. 29, 1916, c. 415, § 7, 39 Stat. 539.

§ 88. Duty to delivery goods on demand; refusal

A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. Aug. 29, 1916, c. 415, § 8, 39 Stat. 539.

§ 89. Delivery; when justified

A carrier is justified, subject to the provisions of sections 90-92 of this title, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. Aug. 29, 1916, c. 415, § 9, 39 Stat. 540.

§ 90. Liability for delivery to person not entitled thereto

Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of section 89 of this title; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. Aug. 29, 1916, c. 415, § 10, 39 Stat. 540.

§ 91. Liability for delivery without cancellation of bill

Except as provided in section 106 of this title, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of

which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. Aug. 29, 1916, c. 415, § 11, 39 Stat. 540.

§ 92. Liability in case of delivery of part of goods

Except as provided in section 106 of this title, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. Aug. 29, 1916, c. 415, § 12, 39 Stat. 540.

§ 93. Alteration of bill

Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill, shall be void whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. Aug. 29, 1916, c. 415, § 13, 39 Stat. 540.

§ 94. Loss, etc., of bill; delivery of goods on order of court

Where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: *Provided*, A voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. Aug. 29, 1916, c. 415, § 14, 39 Stat. 540.

§ 95. Liability on bill marked "duplicate"

A bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. Aug. 29, 1916, c. 415, § 15, 39 Stat. 541.

§ 96. Claim of title as excuse for refusal to deliver

No title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. Aug. 29, 1916, c. 415, § 16, 39 Stat. 541.

§ 97. Interpleader of conflicting claimants

If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate. Aug. 29, 1916, c. 415, § 17, 39 Stat. 541.

§ 98. Reasonable time for procedure allowed in case of adverse claim

If someone other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. Aug. 29, 1916, c. 415, § 18, 39 Stat. 541.

§ 99. Failure to deliver; claim of third person as defense

Except as provided in sections 89, 97, and 98 of this title, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand. Aug. 29, 1916, c. 415, § 19, 39 Stat. 541.

§ 100. Loading by carrier; counting packages, etc.; contents of bill

When goods are loaded by a carrier, such carrier shall count the packages of goods if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the descrip-

tion of them made by him, or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. Aug. 29, 1916, c. 415, § 20, 39 Stat. 541.

§ 101. Loading by shipper; contents of bill; ascertainment of kind and quantity on request

When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words

"Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. Aug. 29, 1916, c. 415, § 21, 39 Stat. 541.

§ 102. Liability for nonreceipt or misdescription of goods

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue. Aug. 29, 1916, c. 415, § 22, 39 Stat. 542; Mar. 4, 1927, c. 510, § 6, 44 Stat. 1450.

§ 103. Attachment, etc., of goods delivered to carrier

If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. Aug. 29, 1916, c. 415, § 23, 39 Stat. 542.

§ 104. Remedies of creditor of owner of order bill

A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process. Aug. 29, 1916, c. 415, § 24, 39 Stat. 542.

§ 105. Lien of carrier

If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. Aug. 29, 1916, c. 415, § 25, 39 Stat. 542.

§ 106. Liability after sale to satisfy lien, etc.

After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill. Aug. 29, 1916, c. 415, § 26, 39 Stat. 542.

§ 107. Negotiation of order bill by delivery

An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a

subsequent indorsee of the bill has indorsed it in blank. Aug. 29, 1916, c. 415, § 27, 39 Stat. 542.

§ 108. Negotiation of order bill by indorsement

An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. Aug. 29, 1916, c. 415, § 28, 39 Stat. 543.

§ 109. Transfer of bill by delivery; negotiation of straight bill

A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right. Aug. 29, 1916, c. 415, § 29, 39 Stat. 543.

§ 110. Negotiation of order bill by person in possession

An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. Aug. 29, 1916, c. 415, § 30, 39 Stat. 543.

§ 111. Title and right acquired by transferee of order bill

A person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good

faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. Aug. 29, 1916, c. 415, § 31, 39 Stat. 543.

§ 112. Rights of transferee of bill without negotiation; notice to carrier

A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods. Aug. 29, 1916, c. 415, § 32, 39 Stat. 543.

§ 113. Compelling indorsement of order bill transferred by delivery

Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. Aug. 29, 1916, c. 415, § 33, 39 Stat. 543.

§ 114. Warranties arising out of transfer of bill

A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby. Aug. 29, 1916, c. 415, § 34, 39 Stat. 543.

§ 115. Liability of indorser of bill

The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations. Aug. 29, 1916, c. 415, § 35, 39 Stat. 544.

§ 116. Warranties by mortgagee, etc., receiving payment of bill

A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described. Aug. 29, 1916, c. 415, § 36, 39 Stat. 544.

§ 117. Negotiation of bill; impairment of validity

The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion. Aug. 29, 1916, c. 415, § 37, 39 Stat. 544.

§ 118. Negotiation of bill by seller, mortgagor, etc., to person without notice

Where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. Aug. 29, 1916, c. 415, § 38, 39 Stat. 544.

§ 119. Rights of bona fide purchaser as affected by seller's lien or right of stoppage

Where an order bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. Aug. 29, 1916, c. 415, § 39, 39 Stat. 544.

§ 120. Rights of mortgagee or lien holder; limitation

Except as provided in section 119 of this title, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them. Aug. 29, 1916, c. 415, § 40, 39 Stat. 544.

§ 121. Offenses; penalty

Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any

other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5,000, or both. Aug. 29, 1916, c. 415, § 41, 39 Stat. 544.

§ 122. Terms defined

In this chapter, unless the context of subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading, governed by this chapter.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"State" includes any Territory, District, insular possession, or isthmian possession. Aug. 29, 1916, c. 415, § 42, 39 Stat. 545.

§ 123. Omitted.

Historical and Statutory Note Codification. Section, Act Aug. 29, 1916, c. 415, § 43, 39 Stat. 545, provided that provisions of this Chapter should not apply to bills made and delivered prior to Jan. 1, 1917.

§ 124. Invalidity of part of chapter

The provisions and each part thereof and the sections and each part thereof of this chapter are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof. Aug. 29, 1916, c. 415, § 44, 39 Stat. 545.

CARRIAGE OF GOODS BY SEA ACT, 46 U.S.C. §§ 1300-1315 (1936)

§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

Apr. 16, 1936, c. 229, 45 Stat. 1207.

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

Apr. 16, 1936, c. 229, § 2, 49 Stat. 1208.

§ 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the

shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such

particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

§ 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to

make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous nature

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like

manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

§ 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Apr. 16, 1936, c. 229, § 5, 49 Stat. 1211.

§ 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Apr. 16, 1936, c. 229, § 6, 49 Stat. 1211.

§ 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Apr. 16, 1936, c. 229, § 7, 49 Stat. 1212.

§ 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

Apr. 16, 1936, c. 229, § 8, 49 Stat. 1212.

§ 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and cir-

cumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

Apr. 16, 1936, c. 229, § 9, 49 Stat. 1212.

§ 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Apr. 16, 1936, c. 229, § 11, 49 Stat. 1212.

§ 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.

§ 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

Apr. 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

§ 1313. Suspension of provisions by President

Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have

been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

(As amended Aug. 6, 1981, Pub.L. 97-31, § 12(146), 95 Stat. 166.)

§ 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

Apr. 16, 1936, c. 229, § 15, 49 Stat. 1213.

§ 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

Apr. 16, 1936, c. 229, § 16, 49 Stat. 1213.

U.C.C. § 1-202. Prima Facie Evidence by Third-Party Documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

U.C.C. § 5-109. Issuer's Obligation to Its Customer.

(1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility

(a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) for any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or

(c) based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

(3) A non-bank issuer is not bound by any banking usage of which it has no knowledge.

U.C.C. § 7-501. Form of Negotiation and Requirements of "Due Negotiation".

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2) (a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(5) Indorsement of a non-negotiable document neither makes it negotiable nor adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

U.C.C. § 7-502. Rights Acquired by Due Negotiation.

(1) Subject to the following section and to the provisions of Section 7-205 on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:

(a) title to the document;

(b) title to the goods;

(c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this Article. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

U.C.C. § 9-304. Perfection of Security Interest in Instruments, Documents, and Goods Covered by Documents; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsection (4) and (5) of this section and subsections (2) and (3) of Section 9-306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor.

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange but priority between conflicting security interests in the goods is subject to subsection (3) of Section 9-312; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21 day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this Article.

U.C.C. § 9-305. When Possession by Secured Party Perfects Security Interest Without Filing.

A security interest in letters of credit and advices of credit (subsection (2)(a) of Section 5-116), goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this Article. The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party.

(3)

No. 90-370

In The

Supreme Court of the United States

October Term, 1990

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES F. CROWDER, JR.
Counsel of Record

KIMBRELL & HAMANN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, Florida 33131
Telephone: (305) 358-8181

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

No. 90-370

In The

Supreme Court of the United States

October Term, 1990

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Fidelity and Deposit Company of Maryland[1] ("F&D"), respectfully requests that this Court

[1] Pursuant to Sup. Ct. R. 29.1 Fidelity and Deposit Company of Maryland is a wholly owned subsidiary of F&D Holding Corp., 50% of which is owned by Swiss Re Holding of North America which is a wholly owned subsidiary of Swiss Reinsurance Company. 50% of F&D Holding Corp. is owned by Maryland Casualty Co. which is wholly owned by Zurich Insurance.

deny the petition for writ of certiorari seeking review of the judgment of the Eleventh Circuit in this case. The opinion of the Court of Appeals is reported in 894 F.2d 1255 (11th Cir. 1990) and is reproduced in the Appendix to the petition at pages A-1-21.

THE PETITION LACKS FORTHRIGHTNESS

The petition asserts a jurisdictional "question" and two substantive "questions" as grounds for granting the writ. With respect to the jurisdictional "question" and the first of the two substantive "questions", the petition asserts or suggests that there are "conflicts" among the decisions of the federal courts of appeals. With respect to the second substantive "question", the petition merely expresses dissatisfaction with the decision of the Circuit Court and repeats the arguments petitioner made below.

We submit that petitioner's brief fails to state forthrightly the facts relating to both the jurisdictional and substantive "questions" and is plainly inaccurate in asserting or suggesting that there are conflicts among the decisions of the Courts of Appeals. As will be shown below:

1. Petitioner's argument on the jurisdictional question is disingenuous and meritless, and

2. Petitioner's argument on its first substantive "question" seeks to evade the simple fact that this case, plainly and clearly, involves only a question of coverage afforded by an insurance policy. This is not a "letter of credit case"; it is an "insurance coverage case".

With respect to petitioner's second substantive "question", which merely repeats its arguments below, we respectfully believe that this "question" was comprehensively dealt with by the Circuit Court and does not require further discussion by F&D.

REASONS WHY THE WRIT SHOULD BE DENIED

1. An Effective Notice of Appeal Was Timely Filed

The Court of Appeals properly held that F&D filed a timely notice of appeal (A-22-23). The final judgment of the District Court in this case, as found by the Court of Appeals, was entered on September 29, 1987 (A-22-23). On October 13, 1987, well within 30 days after September 29, 1987 (Rule 4(a)(1)), F&D filed a supersedeas bond with the clerk of the District Court (A-64-65). The supersedeas bond stated that "[F&D] has entered an appeal to the United States Court of Appeals for the Eleventh Circuit, to review the Final Judgment entered in the above case on the 28th day of September, 1987, and filed in the Court file in said case on September 29, 1987" (A-64).

Clearly, the supersedeas bond fully complied with the requirements of Rule 3(c) by specifying the party taking appeal, the judgment appealed from, and the name of the court to which appeal was taken; and, in compliance with Rule 4(a)(1), it was filed with the clerk of the District Court well within 30 days after the date of the judgment appealed from.

Petitioner's contention that a stipulation, signed by the attorneys for both parties, which was entitled

"Stipulation to Stay Execution And For Approval of Supersedeas Bond", shows that F&D did not intend to appeal from the final judgment filed September 29, 1987, even though the supersedeas bond specifically said that F&D was appealing from that judgment, is, to say the least, disingenuous. The stipulation stated in part, that "As ground for said motions, the parties [i.e., F&D and the instant petitioner] state to the Court that it is the intention of Fidelity and Deposit Company of Maryland to take an appeal of this Court's Final Judgment, although it currently has pending a motion to alter said Final Judgment to delete therefrom the reference to 'per diem' on the grounds set forth in its previously filed Rule 59 motion" (A-61).

Petitioner does not deny that it was fully aware, at all times, that F&D intended to appeal from the final judgment of the District Court, nor does it claim that it was in any way misled or prejudiced. As appears in the Appendix, F&D also filed notices of appeal from the "Amended Final Judgment" entered on October 21, 1987 and from the order dated January 20, 1988 awarding attorney's fees to petitioner (A-66-67, 68). It was a certainty in this case, at all times fully known to petitioner, that F&D intended to appeal from the final judgment of the District Court, since F&D filed several notices that it was appealing in order to assure that it would not miss a jurisdictional filing date.

We submit that the applicable law is clear and well established that a filing which, as in the instant case, evinces a party's intention to appeal, complies with the requirements of Rules 3(c) and 4(a)(1), and does not mislead or prejudice the other party, constitutes an effective

notice of appeal (*Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 101 L.Ed.2d 285, 108 S.Ct. 2405 (1988); *Foman v. Davis*, 371 U.S. 178, 9 L.Ed.2d 222, 83 S.Ct. 227 (1962); *Dura Systems, Inc. v. Rothbury Investments Ltd.*, 886 F.2d 551 (3rd Cir. 1989); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974)).

Finally, on the jurisdictional question, we submit that the contention in petitioner's brief (p. 7) that "The Circuits Are In Conflict In Deciding What Types of Documents Constitute The Functional Equivalent Of A Notice of Appeal" is not supported by the cases cited and is clearly inaccurate. We submit that all the Circuits are in full accord that the procedural rules relating to effecting an appeal should be liberally construed in order to permit the consideration of a case on its merits (*Torres v. Oakland Scavenger Co., supra*, 487 U.S. at p. 316).

2. This is an "Insurance Coverage Case" and not a "Letter of Credit Case".

Petitioner's brief substantially misstates and distorts the opinion of the Court of Appeals.

The opening paragraph of the Circuit Court's lucid and comprehensive opinion clearly states that the issue before the Court was whether F&D's banker's blanket bond "covered the risk taken by [petitioner] in its letter of credit transaction" (A-1-2). The specific question was whether Clause (E) of the bond covered forged bills of lading received by a bank from the beneficiary when the beneficiary draws under a letter of credit. After a thorough review of the specific terms of the bond and of the relationships among the three parties to a letter of credit transaction, the Court of Appeals held that such coverage

was excluded by the explicit terms of the bond (A-14) and that, in any event, the bond could not be reasonably construed to afford such coverage (A-15-17).

It should be noted that F&D acknowledged that Clause (E) afforded coverage for forged bills of lading deposited by a bank's customer as security for the making of a loan or an extension of credit. F&D, in its brief in the Court of Appeals, stated: "There is, of course, no doubt that Insuring Agreement (E) would afford coverage to a bank for 'securities' [including bills of lading (A-12-13)] which are actually deposited with it by its customer as a condition for the issuance of the letter".

In short, the Court of Appeals, in its opinion, did not express any views that would limit the right of a bank to extend credit on such bases as it saw fit. The Court merely noted that " . . . this court has long recognized that a banker's blanket bond 'is not a policy of credit insurance and does not protect the bank when it simply makes a bad business deal' " (A-16), and, for the reasons which it explained at length, the Court concluded as follows: "Were we to hold that [petitioner] could recover on a banker's blanket bond in the instant transaction, we would in effect transform the blanket bond into such an insurance policy" (A-16-17).

In light of the narrow holding in the Circuit Court's opinion, petitioner's brief on the substantive "questions", raising the specter of dire impact on "commerce", is essentially irrelevant. The Circuit Court's opinion in this case is not likely to have a significant effect on established banking practices regarding letters of credit. As this Court said in *FDIC v. Philadelphia Gear Corp.*, 476 U.S.

426, 440, 90 L.Ed.2d 428, 440, 106 S.Ct. 1931, 1939 (1986): "With a standard 'commercial' letter of credit [the customer] would typically have unconditionally entrusted [the bank] with funds before [the bank] would have written the letter of credit . . . ". As above stated, if, instead of depositing funds with the bank, the customer deposited forged bills of lading as security for the issuance of the letter, Clause (E) would afford coverage.

SUMMARY

1. The Court of Appeals properly decided that F&D filed a timely notice of appeal from the final judgment of the District Court in this case and the decision is not in conflict with the decision of any other Circuit Court.

2. The only issue in this case is a question of insurance coverage. The issue was properly decided by the Court of Appeals and the decision is not in conflict with the decision of any other Circuit Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES F. CROWDER, JR.
Counsel of Record

KIMBRELL & HAMANN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, Florida 33131
Telephone: (305) 358-8181

Attorneys for Respondent

No. 90-370

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION OF RESPONDENT TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

JAMES F. CROWDER, JR.
Counsel of Record

KIMBRELL & HAMANN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, Florida 33131
Telephone: (305) 358-8181

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

OPPOSITION OF RESPONDENT TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Respondent Fidelity and Deposit Company of Maryland[1] (F&D) files this objection pursuant to Sup. Ct. R. 37.4 to apprise the Court of the reason why it refused consent to the filing of a brief *amicus curiae* and to set forth its reason for opposing the instant motion.

REASON FOR REFUSING CONSENT

F&D stated its reason for refusing consent in a letter dated September 21, 1990, sent by James F. Crowder, Jr., F&D's counsel of record, in response to a letter dated September 13, 1990, sent to him by Michael F. Crotty, Esq., one of the attorneys making the instant motion on behalf of American Bankers Association.

The last paragraph of Mr. Crowder's letter, dated September 21, 1990, read as follows:

> "Your letter of September 13, 1990 gives no indication of the 'relevant matter . . . that has not already been brought to [the Court's] attention by the parties . . . ' that an *amicus* brief by the American Bankers Association would provide to the Court. We have reviewed the *amicus* brief filed on behalf of the American Bankers Association in the Eleventh Circuit, and it seems to us that the points and arguments made in that brief are fully covered by Republic's brief in support of its petition for a writ of certiorari. Accordingly, we believe we are constrained by

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[1] See footnote 1 in Respondent's Brief in Opposition for list required by Sup. Ct. R. 29.1.

the second sentence of Rule 37.1 to withhold our consent to the American Bankers Association filing an amicus brief."

REASON FOR OPPOSING THIS MOTION

Having now had the opportunity to see the proposed brief *amicus curiae* submitted with the instant motion, F&D remains of the view that the points and arguments made in that brief are fully covered in the Petitioner's brief and that, accordingly, F&D is constrained by the second sentence of Rule 37.1 to oppose the instant motion.

Respectfully submitted,

JAMES F. CROWDER, JR.
Counsel of Record

KIMBRELL & HAMANN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, Florida 33131
Telephone: (305) 358-8181

Attorneys for Respondent

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Supreme Court of the United States

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Petitioner,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION AND FLORIDA BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

J. THOMAS CARDWELL
AKERMAN, SENTERFITT & EIDSEN
755 South Orange Avenue
Firstate Tower - 10th Floor
Orlando, FL 32802
(407) 843-7860

Attorney for Amicus Curiae
Florida Bankers Association

JOHN J. GILL
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Deputy General Counsel
for Litigation

Attorneys for Amicus Curiae
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

September 28, 1990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-370

REPUBLIC NATIONAL BANK OF MIAMI,
Petitioner,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION OF THE AMERICAN BANKERS ASSOCIATION AND FLORIDA BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

Pursuant to the provisions of Rule 37.2 of the Rules of this Court, the American Bankers Association and Florida Bankers Association respectfully move for leave to file the attached Brief as Amici Curiae. The Petitioner has consented to the filing; the Respondent has declined to consent.

The American Bankers Association is the principal national trade association of the commercial banking

industry in the United States, having members in each of the fifty states and the District of Columbia. The Florida Bankers Association is the principal state trade association of the banking industry in Florida.

Issuing commercial letters of credit is a multi-billion dollar part of the business of commercial banks in Florida and throughout the United States. For letters of credit to serve their critical role in financing interstate and international transactions, they must be governed by well understood and uniformly applied rules. Letters of credit transactions cannot afford for variations, discrepancies, ambiguities and misunderstandings to creep into the law. Since the decision of the Eleventh Circuit below involves just such a misunderstanding of the practices in the letter of credit business, the two trade associations of the industry which relies upon those practices and understandings have an interest in seeing things set right.

WHEREFORE, the American Bankers Association and Florida Bankers Association respectfully request that the Court grant leave to file the attached brief as amici curiae in support of the petition for a writ of certiorari.

Respectfully submitted,

JOHN J. GILL
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Deputy General Counsel
for Litigation

Attorneys for Amicus Curiae
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

J. THOMAS CARDWELL
AKERMAN, SENTERFITT & EIDSEN
755 South Orange Avenue
Firstate Tower - 10th Floor
Orlando, FL 32802
(407) 843-7860

Attorney for Amicus Curiae
Florida Bankers Association

September 28, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 3(c) of the Federal Rules of Appellate Procedure a supersedeas bond filed with a stipulation in which Appellant stated it was not then appealing constitutes a notice of appeal or its functional equivalent.

2. Whether a bank which issues a commercial letter of credit to finance the purpose of goods acts unreasonably, as a matter of law, in relying upon the documents of title and the underlying goods as collateral in the transaction.

3. Whether a standard bankers blanket bond—which provides coverage for loss resulting directly from the bank's having in good faith acquired, or given value, extended credit, or assumed liability, on the faith of, or otherwise acted upon, any original forged bill of lading—insures a bank against a loss sustained from honoring a letter of credit after presentation of original forged bills of lading held by the bank as collateral.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-370

REPUBLIC NATIONAL BANK OF MIAMI,
Petitioner,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AND FLORIDA BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

The American Bankers Association and Florida Bankers Association, with leave of the Court, hereby respectfully submit this brief as amici curiae to urge the Court to grant the Petition for Writ of Certiorari in the above-entitled case.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the principal national trade association of the commercial banking

industry in the United States. It represents banks of all types and sizes—national and state-chartered, money center, regional and community banks, bank holding company-owned and independent banks. There are ABA member banks in each of the fifty states and the District of Columbia, and its member banks hold approximately ninety-five percent of the domestic assets of American banks.

The Florida Bankers Association is the primary representative, on the state level, of the commercial banking industry in Florida.

Issuing letters of credit is an important part of the banking business. Approximately $200 billion in credits are now outstanding in the United States.[1] Letters of credit have a special role in facilitating interstate and international multi-party transactions. The letter of credit device can only fill the role if all parties to any given transaction have a common understanding of the rules under which they are operating. In recognition of that need, the legislatures of the fifty states have enacted Article 5 of the Uniform Commercial Code, and the international business community, under the auspices of the International Chamber of Commerce, has promulgated and agreed to abide by the Uniform Customs & Practice for Documentary Credits.[2]

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[1] American Bar Association/U.S. Council on International Banking, *An Examination of U.C.C. Article 5 (Letters of Credit)* (1989) at xi.

[2] *See* J. Dolan, *The Law of Letters of Credit* (1984), ¶ 6.02: "Since 1962, all significant banking centers, with few exceptions, have adopted the Uniform Customs formally or informally and have thereby obviated the plethora of technical problems that could sabotage the smooth operation of documentary credits."

Paradoxically, while letters of credit need uniform and readily understood rules in order to operate effectively, the device is unfamiliar and little understood outside the branch of the banking industry (and the customers it serves) which specialize in this form of financing. Regrettably, the lack of understanding has resulted in the occasional judicial effort to analyze a letter of credit dispute by likening the documents at issue to other, more familiar, documents to which letters of credit bear some surface similarity. It does not work. It creates nothing but confusion, ambiguity and more litigation in a marketplace structure that can ill afford it. Your amici have a distinct interest in having order restored to this branch of our industry, and this case is a good starting point for the accomplishment of that end.

REASONS FOR GRANTING THE WRIT

We are well aware that Rule 10 of the Supreme Court Rules, "Considerations Governing Review on Writ of Certiorari," focuses upon questions of federal law. But the rule also provides, by its own terms, that it does not fully measure the Court's discretion. In this case, there is no federal statute or constitutional provision governing the general subject matter of letters of credit. Nevertheless, it is too facile a reaction to this case simply to dismiss it as a matter only of Florida law. It is much more than that. As indicated above, the law applicable to letters of credit is truly a combination of national (if not federal) law embodied in Article 5 of the Uniform Commercial Code and of private international law.[3] It is the intent

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[3] "The Uniform Customs are promulgated by the world's lead-

of the legislators of that law that it be uniformly interpreted and applied, and in order for that intent to be carried out, there must be a single, final judicial authority able and willing to serve in that capacity—this Court.

The dispute between the bank and the insurance company in this case is easy to articulate but hard to resolve. The bank purchased an insurance policy from F&D to protect itself against losses from forgeries, among other things. The bank issued a letter of credit in order to facilitate an international sale of coffee, taking original bills of lading as collateral for its commitment. After honoring the letter of credit, the bank discovered that the bills of lading were forged and that no coffee ever existed. The bank, therefore, lost over $1.2 million. If it was a loss due to forgery, the insurance company is obliged to recompense the bank under the policy. If it was a loan loss, it was not covered by the policy.

The Eleventh Circuit found that the loss was a loan loss. In arriving at that conclusion, however, the court exhibits a fundamental misunderstanding of how letters of credit work.

Letters of credit serve several functions. One function is as a method of payment. Another is as a method of financing akin to inventory financing, or

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ing commercial trade group (the ICC) and indorsed by the trade arm (UNCITRAL) of the largest international organization (the United Nations). Certainly, courts may identify weaknesses in the Uniform Customs or policies that conflict with those of the Uniform Customs. Absent those weaknesses or conflicting policies, the Uniform Customs provide courts with a thoughtful body of rules that they may elect to use." Dolan, *id.* at ¶ 4.06(1)(c).

asset based lending. Frequently it is a combination of both.

Where the letter of credit functions as a payment mechanism, the bank must be able to rely on the actual documents that are presented to it for payment. The bank is not a participant in the sale of goods. It has no responsibility for the underlying contract. U.C.C. § 5-109(1)(a); U.C.P. Art. 8. In a pure letter of credit situation the bank is a payment intermediary. In order for the letter of credit to be effective there must be as few uncertainties as possible when documents such as bills of lading are presented for payment.

Disputes over payment would make the letter of credit useless. As a result, the Uniform Commercial Code ("UCC") limits the responsibility of the bank to a determination of whether the payment documents are regular on their face. If they are, the bank pays. If they are not, the bank does not pay. The bank's responsibility, to see that the documents are regular on their face, is one that is within its control. Those things that are not within the bank's control—the quality of goods, performance of the contract, the genuineness of the documents—are matters for which the bank is not responsible.

The UCC does not make the issuer responsible for determining the genuineness of the documents. U.C.C. § 5-109(2). *See also* U.C.P. Art. 9. This is necessary to make letters of credit work. If the bank had the responsibility of determining if the documents were genuine, then it would have to engage in an investi-

gation beyond its role as payment intermediary.[4] This would create doubt about the reliability of the letter of credit as a method of payment and thus undercut its usefulness as a mechanism by which sellers of goods could be assured they would be paid without question or argument.

It is important to note that the beneficiary warrants the documents as well as the conditions of the credit. U.C.C. § 5-111(1) provides:

> (1) . . . [T]he beneficiary by transferring a documentary draft on demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with.

The beneficiary thus makes a statutory warranty to the bank upon which the bank is entitled to rely. The Eleventh Circuit's decision that the bank cannot rely on the genuineness of the documents directly deprives the bank of the warranty the law provides. The result is that banks will be reluctant to issue many letters of credit knowing that they could *only* rely on the credit of its customer and not on the warranties of the UCC.

In any commercial transaction there is always the possibility of forged or fraudulent documents. One

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[4] The duty of the bank is colorfully described in *Instituto Nacional v. Continental Illinois National Bank*, 675 F. Supp. 1515, 1520 (N.D. Ill. 1987). "There is no question the . . . bank . . . is not required to play detective. If it must act in a Holmesian manner at all, the nature of its duties draws more from Oliver Wendell than from Sherlock. [citing Kozolchyk, 8 Geo. Mason U. L. Rev. 287, 329]. It is obligated only to place the description of the documents called for in the letter of credit alongside the documents actually presented to see whether they jibe in facial terms."

way in which the bank deals with such risk is by relying on beneficiaries' warranties as well as by insurance. The bankers' blanket bond is a coverage for which banks pay substantial sums in order to protect themselves against just the risk that occurred in this case; that it was money paid based on documents that are forged. But for the forged documents, the bank would not have sustained the loss. The documents are the direct and consequential cause of the loss. Without the forged documents in the hands of the bank upon which it relied the loss never would have occurred.

In addition, the court below attempts to shift the cause of the loss from the fraudulent documents to the decision of the bank to issue the letter of credit at the request of its customer. This is not consistent with what occurs in actual commercial practice nor is it consistent with the Uniform Commercial Code or the Uniform Customs and Practice for Documentary Credits ("UCP").

The letter of credit serves not only as a mechanism for payment, but may also serve as a form of inventory financing. The bank, in agreeing to issue a letter of credit, may look to the value of the goods being purchased as collateral for issuance of and payment on the letter of credit. The bank's customer is frequently a purchaser of goods. A significant part of the decision to issue the letter may be based upon the availability of the goods as collateral for the payment which the bank makes to the seller. The bank *does* rely on the bill of lading. Without the collateral in the form of the goods represented by the bill of lading, the bank may well not have been willing to enter into the transaction initially.

The Eleventh Circuit's pronouncement that under accepted standards of commercial reasonableness a bank never relies on the documents presented for payment is simply not correct. The analysis that the bank only looks to the credit of its own customer is too narrow a view. It is no more true here than it would be for other kinds of financing. Obviously, banks assess the creditworthiness of a purchaser before making a real estate loan, but they also take back a mortgage on the property and rely upon the genuineness of the title documents in doing so. The same may be said for automobile and boat loans, inventory financing and so forth. If it were true that the bank could never look to the value of the goods as a factor in assessing the transaction, it would greatly restrict the bank's ability to issue letters of credit.

Banks have generally considered letters of credit to be a form of secured lending since the goods purchased serve as collateral should the bank's customer not repay the bank. The court below converts this aspect of the letter of credit into unsecured lending. Forcing the bank to rely solely on the credit of its customer reduces the amount of credit available and diminishes its usefulness in national and international trade.

The opinion below fails to analyze the nature of the letter of credit correctly when it concludes that the operative reliance occurs when the bank issues the letter of credit. This is the basis for the conclusion that, as a matter of law, the bank cannot be said to "rely" on the documents presented for payment.

The "establishment" of liability of the issuing bank is defined and governed by U.C.C. section 5-106. Es-

tablishment as to the customer occurs when the letter of credit is sent to him or to the beneficiary. As regards the beneficiary, it is established when received. Even though a letter of credit is "established," however, there are still contingencies that must occur before the bank pays value. Those conditions include the presentation of the letter of credit to the bank. The issuer's obligation to pay, and thus truly "extend credit," is wholly dependent on the beneficiary's performance. *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230 (5th Cir. 1983).

The court below is correct in assuming that a credit is extended to the beneficiary at the time the letter of credit is issued. However, this credit is basically inchoate and, until such time as payment is made on the letter of credit, it is merely "a commitment on the part of the issuing bank that it will pay a draft or demand for payment presented to it under the terms of the credit." *Bank of Newport v. First National Bank and Trust Company of Bismarck*, 687 F.2d 1257, 1261 (8th Cir. 1982). Since the banks' obligation to perform is simply a contingent liability, there is no giving of value by the bank under the terms of the bankers' blanket bond. The purpose of the bond is to insure against a fraudulently-induced payment. The bank neither extended credit nor gave value until the time it received physical possession of the forged documents *upon which it relied.*

Until the time that the conditions are met by the beneficiary, the obligation of the issuer to perform on its promise to pay the letter of credit is simply a contingent obligation. The letter of credit may never be exercised, it may expire of its own terms or the beneficiary may not present proper documents trig-

gering the contingency. In fact, in the leading case in Florida regarding an issuer's duties with regard to honoring a letter of credit the District Court of Appeals stated, "[A] letter of credit amounts to an offer by the issuer to purchase certain documents. If those documents are not tendered, the offer is not accepted, and issuer is not bound." *Fidelity National Bank of South Miami v. Dade County*, 371 So. 2d 545, 548 (Fla. App. 1979).

The court below treats issuance of the letter of credit exclusively as an extension of credit—a loan—to the bank's customer based *only* on the customer's credit and without reference to the goods being acquired. This is simply not correct. While the letter of credit transaction may involve a loan, this is by no means necessarily the case. For example, a bank may issue a letter of credit only when it is actually holding funds of its customer. When the documents are presented, the bank pays with the funds of the customer that it has on hand and no loan is ever made. Conversely the bank may simply lend its credibility by issuing a letter of credit but may never give actual value if the beneficiary chooses not to comply or submit noncomplying documents.

The issuance of the letter of credit is clearly not a loan. It is approval to make a payment based on future contingencies. The bank's agreement is that for the time specified it will pay the amount of the letter of credit *if* and when documents regular on their face are presented.

Of course, the letter of credit may be used in conjunction with a loan to the bank's customer as was the case here. When that occurs the extension of credit comes *after* the letter of credit is honored. At

that point rather than reimburse the bank immediately, the customer then becomes a borrower, promising to pay the funds advanced for its benefit over time. This is a loan and interest is charged at the negotiated rate. The charge for issuing the letter of credit is a flat fee payable regardless of when, if ever, the beneficiary draws upon the letter of credit. If it does, and then if a loan is made in conjunction with it, an extension of credit will have been made.

From the foregoing it should be clear that neither as a matter of law or commercial practice is the decision to issue the letter of credit an irrevocable commitment to extend credit to the customer. By focusing on the extension of the credit aspect of a letter of credit transaction the court below erroneously concludes that the only meaningful reliance is on the credit of a bank's customer. But in fact the bank is entitled to rely, and must rely, on the documents that are presented to it. It may rely on the goods involved in the transaction as security in its decision to issue the letter and in many cases no extension of credit at all will be involved.

The fact is that banks do rely in two crucial respects on the genuineness of the documents presented. The first is to trigger the payment of funds pursuant to the existing contract with the customer and the second is to provide the bank with collateral in the case where the letter of credit is used in conjunction with a loan to the customer.

CONCLUSION

The Eleventh Circuit decision in this case greatly misconstrues commercial practice and uniform law in the area of letters of credit. It is part and parcel of

a disturbing trend in the courts to do precisely that,[5] chipping away at the very foundation of this important device in interstate and international commerce. It is a trend which needs to be reversed. Since trends can only be addressed by addressing cases, we respectfully urge the Court to address this one by granting the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN J. GILL
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Deputy General Counsel
for Litigation

Attorneys for Amicus Curiae
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

J. THOMAS CARDWELL
AKERMAN, SENTERFITT & EIDSEN
755 South Orange Avenue
Firstate Tower - 10th Floor
Orlando, FL 32802
(407) 843-7860

Attorney for Amicus Curiae
Florida Bankers Association

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[5] *See, e.g., Exxon Co. USA v. Banque de Paris et des Pays Bas*, 889 F.2d 674 (5th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990) (allowing beneficiary to recover under a letter of credit in disregard of explicit expiry date); *Federal Deposit Insurance Corp. v. Bank of Boulder*, ___ F.2d ___ (10th Cir. 1990) (allowing transferee of original beneficiary of letter of credit to recover in disregard of statutory limitation on transferability).